Jurisdictional Statement

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

ROBERT MONROE SHELDON, APPELLANT

v.

LAURA LEE SHELDON, APPELLEE

ON APPEAL FROM THE COURT OF APPEAL
OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION ONE

JURISDICTIONAL STATEMENT

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February 24, 1982

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. _____

ROBERT MONROE SHELDON, APPELLANT

v.

LAURA LEE SHELDON, APPELLEE

ON APPEAL FROM
THE COURT OF APPEAL OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION ONE

JURISDICTIONAL STATEMENT

Appellant Robert Monroe Sheldon appeals from the final judgment of the Court of Appeal of California, Fourth Appellate District, Division One, following the California Supreme Court's denial of his petition for hearing.

QUESTIONS PRESENTED

I. Whether the Lower Court is constrained to follow the decision of this Court in McCarty v. McCarty (1981) 453 U.S. _____, under the doctrine of stare decisis where appellate jurisdiction had not expired.

II. Whether federal pre-emption of state community property laws regarding division of military retirement pay renders state judgments void for lack of subject matter jurisdiction where such judgments were entered after Congress had pre-empted the area of law.

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United States v. United States Fidelity and Guar. Co.
309 U.S. 506 (1940) 19

STATUTES CITED:

California Civil Code
Section 4800(a) 12,15,1

OPINIONS BELOW

The Court of Appeal issued its opinion on October 7, 1981, which was published. The First Modification of Opinion was filed on October 9, 1981. The Second Modification of Opinion was filed on November 4, 1981. (Appendix A, Infra) The California Supreme Court rendered no opinion when it denied Appellant's Petition for Hearing. (Appendix C, Infra)

JURISDICTION

The California Court of Appeal entered its judgment on October 7, 1981. The Supreme Court of California denied Appellant's Petition for Hearing on December 2, 1981. A Notice of Appeal to this Court was duly filed in the California Court of Appeal on February 26, 1982.

This appeal is being docketed within 90 days of the California Supreme Court's denial of Appellant's Petition for Hearing.

Appellant has argued below that the California Civil Code §4800(a), as it purports to characterize federal military retirement pay as community property, was repugnant to federal statutes and has been pre-empted by federal statutes and therefore is invalid under the United States Constitution. The California courts have upheld the statute's validity.

This Court's jurisdiction is invoked under 28 U.S.C. §1257(2). Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282 (1921); McCarty v. McCarty, 453 U.S. _____ (1981).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the following statutes:

California Civil Code, Section 4800(a)

This statute, along with Article VI, Clause 2 of the United States Constitution, appear in Appendix E.

STATEMENT OF THE CASE

The parties filed for dissolution of marriage on February 9, 1979. A trial of the matter was held on June 22, 1979, with the trial court taking the matters of division of the community property residence and the military pension benefits under submission. On July 25, 1979,

the San Diego Superior Court entered Judgment ruling, among other things, that Petitioner (wife) had a community interest in Appellant husband's military retirement benefits in the sum of $58,498.00. The trial court as and for an offsetting award to said pension, gave to the wife what amounted to the entire community estate, namely the community residence.

The Interlocutory Judgment of Dissolution of Marriage was filed on February 13, 1980. On February 14, 1980, Notice of Entry of Judgment was filed. Notice of Appeal from the Judgment was filed by Appellant on April 7, 1980.

On June 8, 1981, the Court of Appeal filed its opinion of decision (unpublished) upholding the trial court's order.

On June 26, 1981, this Court rendered its decision in McCarty v. McCarty, 453 U.S. _____.

Appellant timely filed his Petition

for Rehearing in the California Court of Appeal, Fourth Appellate District, Division One, and rehearing was granted.

On July 8, 1981, the Appellate Court requested both counsel to submit letter briefs addressing the effect of McCarty v. McCarty, ibid.

On July 27, 1981, Appellant filed his supplemental "Letter Brief".

On October 7, 1981, the Fourth District Court of Appeal, Division One, filed its opinion. On October 9, 1981, the Appellate Court filed its "Modification of Opinion". On November 4, 1981, the Appellate Court filed its "Second Modification of Opinion".

On November 16, 1981, Appellant filed his Petition for Hearing in the Supreme Court of California.

On December 2, 1981, hearing was denied in the California Supreme Court.

THE QUESTION IS SUBSTANTIAL

The questions raised warrant plenary consideration for the following reasons:

1. THE DECISION BELOW CONFLICTS WITH THE RULE PRONOUNCED BY THIS COURT IN McCARTY V. McCARTY.

The California Court of Appeal, Fourth District, Division One, acknowleged in its written opinion that appellate jurisdiction had not yet expired when Appellant first addressed the issue of federal pre-emption,as resolved by this Court in McCarty v. McCarty (1981) 453 U.S. _____, in his supplemental brief on Rehearing. See In Re Marriage of Sheldon (1981) 124 Cal.App. 3d, 371 at 382, 383. The lower court's sole reason for granting rehearing was to address the effect of the McCarty decision upon the instant case.

> We granted a rehearing to address several problems inherent in the application of McCarty to California dissolution proceedings. Sheldon, supra, 124 Cal.App. 3d at 376.

The lower court, however, failed to apply the law of McCarty to the instant case. At the time of decision by the lower court it was a settled principle of California law that an appellate court applies the law as it stands at the time of decision, notwithstanding the fact that a change in the law had occurred after the trial court's jurisdiction was exhausted. Beard v. Atchison Topeka and Santa Fe Ry. Co., (1970) 4 Cal.App. 3d 129, 135. In Re Marriage of Brown (1976) 15 Cal. 3d 838, 851.

Consideration and application by appellate courts of new and crucial points of law that arise after initial briefs are filed is both sound jurisprudence and accepted practice under California law. Meier v. Ross General Hospital (1968)

69 Cal. 2d 420, 423-424, fn. 1; Kievlan v. Dahlberg Electronics, Inc. (1978) 78 Cal.App. 3d 951, 957, fn. 5 (citing Meier, ibid.); Estate of Fries (1963) 221 Cal.2d 725, 730-731.

Congress' pre-emption of the area of military retirement, as declared on June 26, 1981 by this Honorable Court in McCarty, bound the lower court to apply, in the instant case, the holding of McCarty as stare decisis while appellate jurisdiction was open. Its refusal to apply this Court's decision in McCarty directly violated the principle of stare decisis and the Supremacy Clause of the United States Constitution.

2. THE COURT OF APPEAL BELOW ERRED IN CHARACTERIZING THE APPELLANT'S MILITARY RETIREMENT PAY AS COMMUNITY PROPERTY SUBJECT TO DIVISION UPON DIVORCE BECAUSE STATE COM-

MUNITY PROPERTY LAWS HAD BEEN PRE-EMPTED BY PERTINENT ENACTMENTS.

The federal scheme of military retirement benefits pre-empts all state community property laws with respect thereto, and the state courts are accordingly precluded by the Supremacy Clause from dividing such benefits upon divorce. McCarty v. McCarty (1981) 453 U.S. _____. Moreover, by the Court of Appeal affirming the trial court's characterization and valuation of the military retirement as a community property asset and awarding same to Appellant herein, while granting to the wife an offsetting award of the entire community estate, namely the community residence, the court below unconstitutionally applied California Civil Code Section 4800(a) to Appellant's federal military pension. In Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979) this

Court stated as follows:

> An offsetting award, however, would upset the statutory balance and impair [the retiree's] economic security just as surely as would a regular deduction from his benefit check. Hisquierdo, supra, 439 U.S. 572 at 588.

3. FEDERAL PRE-EMPTION OF STATE COMMUNITY PROPERTY LAWS RENDERS STATE JUDGMENTS VOID INSOFAR AS THEY PURPORT TO AWARD THE NON-SERVICE MEMBER SPOUSE AN INTEREST IN SAID MEMBER'S MILITARY RETIREMENT PAY.

The McCarty appeal, and the Supreme Court's decision thereon, was based upon the Appellant having called into question the validity of the California statute under which the military pension was divided. In McCarty, this Honorable Court explained how the appeal was properly at bar:

> Appellee contends that this is not a proper appeal because appellant did not call the constitutionality of any statute into question in the California courts. Our review of the

> record, however, leads us to conclude otherwise. McCarty, supra, 101 S.Ct., at 2734, fn. 12.

This Court noted Appellant's (McCarty) contention in the state court that the Supremacy Clause "pre-empts all state community property laws" as applied to federal military retired pay, ibid, and that "California courts are accordingly precluded by the Supremacy Clause from dividing such benefits." Ibid. Therefore, on the authority of Dahnke-Walker Milling Co. v. Bondurant (1921) 257 U.S. 282, this Court concluded that Colonel McCarty had brought a proper appeal. Ibid. In Dahnke-Walker, this Court noted that the appellant therein

> . . . did not simply claim a right or immunity under the Constitution of the United States, but directly insisted that as to the transaction in question the . . . statute was void, and therefore unenforceable, because in conflict with the commerce clause (emphasis added) . . . Id. at 288-289 (cited in McCarty, supra, 101 S.Ct., at

2734, fn. 12).

The question answered in McCarty was, therefore, whether California Civil Code Section 4800(a) was void, insofar as it purported to divide a military pension, because in conflict with federal military retirement statutes and pre-empted through the Supremacy Clause. This Court in Dahnke-Walker explained further:

> That the statute was not claimed to be invalid in toto and for every purpose does not matter. A statute may be invalid as applied to one state of facts, and yet valid as applied to another. (citations omitted.) Besides, a litigant can be heard to question a statute's validity only when and so far as it is being or is about to be applied to his disadvantage. (emphasis added.) (citations omitted.)
>
> . . .
>
> Our conclusion on the jurisdictional question is that, as the state court applied and enforced to the plaintiff's disadvantage a state statute which the plaintiff seasonably insisted as so applied and enforced

> was repugnant to the Constitution and void, the case is rightly here on writ of error (emphasis added). Id. at 289-290.

McCarty's reversal of the California Court of Appeal sustains the conclusion that Civil Code Section 4800(a) is void insofar as judgments based upon it purport to divide military pensions. The Texas Court of Appeals in Ex Parte Buckhannan, 626 S.W. 2d 65 (1981) (Court of Appeals, Fourth Supreme Judicial District of Texas, October 15, 1981) concurred:

> Respondent argues that the judgment under attack in the case before us is at worst erroneous, and not void, and that the relief sought by relator is thus barred by the doctrine of res judicata. We cannot agree. The court pointed out in McCarty that when Congress enacted the military retirement system, it acted pursuant to its express constitutional power over the armed forces; and the court observed further that 'in no area has the court accorded Congress greater deference than in the conduct and control of military

affairs.' ____ U.S. at _____, 101 S.Ct. at 2743, 69 L.Ed. 2d at 608. When Congress has exercised its plenary power to deprive State courts of jurisdiction over a particular subject, judgments of State courts purporting to exercise jurisdiction over the preempted subject are 'nullities and vulnerable collaterally.' Kalb v. Feuerstein, 308 U.S. 433, 439 (1940).[4]

Footnote 4. The Kalb doctrine remains one of the few exceptions to the general rule that final judgments are not subject to collateral attack, even on grounds of lack of jurisdiction. The doctrine is rooted in the principle that collateral attacks on subject matter jurisdiction in preemption cases may serve as an important policy extrinsic to the judicial system. The continuing vitality of the Kalb doctrine is reflected by its codification in the Restatement (Second) of Judgments. See Moore, Collateral Attacks on Subject Matter Jurisdiction: A Critique of the Restatement (Second) of Judgments, 66 CORNELL L. REV. 534 (1981). Buckhannan, supra at 7.

The doctrine that collateral attack to challenge the jurisdiction of a state court will be allowed on the grounds that

the policy underlying res judicata (that there should be an end to litigation) was outweighed by a strong federal policy that would be obstructed if the court were allowed to act in excess of jurisdiction, was explained in Kalb as follows:

> The states cannot, in the exercise of control over local laws and practice, vest State courts with power to violate the supreme law of the land. Id. at 439.

Kalb also repeated the principle that

> . . . a State court before which a proceeding is competently initiated may - by operation of supreme Federal law - lose jurisdiction to proceed to a judgment unassailable on collateral attack . . . Id. at 440, fn. 12;

and that

> . . . considerations as to whether the issue of jurisdiction was actually contested in the (State) Court, or whether it could have been contested, are not applicable where the plenary power of Congress . . . has been exercised as in this Act. Id. at 444.

Similarly, in United States v. United States Fidelity & Guar. Co. (1940) 309 U.S. 506, this Court permitted collateral attack of a judgment on a cross-claim against the United States, on the ground that since the United States has not waived its sovereign immunity, the court entering the judgment had no jurisdiction. The doctrine of sovereign immunity was held to outweigh the policy underlying res judicata. If such immunity could be waived "it would subject the Government to suit in any court in the discretion of its responsible officers. This is not permissible." Id. at 513.

In McCarty, this Court emphasized the plenary power of Congress over military affairs, explaining at 101 S.Ct., 2741 as follows:

> Under the Constitution, Congress has the power "(t)o raise and support Armies," "(t)o provide and maintain a Navy," and "(t)o make Rules for the Government and Regulation of the land

> and naval Forces." U.S. Const., Art. I, Section 8, cls. 12, 13, and 14. See generally Rostker v. Goldberg, _____ U.S. _____, (1981) (slip op. 5). Pursuant to this grant of authority, Congress has enacted a military retirement system designed to accomplish two major goals: to provide for the retired service member, and to meet the personnel management needs of the active military forces. The community property division of retired pay has the potential to frustrate each of these objectives.

And at page 2743 of 101 S.Ct.:

> We have very recently re-emphasized that in no area has the Court accorded Congress greater deference than in the conduct and control of military affairs. See Rostker v. Goldberg, _____ U.S. _____, at _____ (slip op. 5). Thus the conclusion that we reached in Hisquierdo (439 U.S. 572 (1979)) follows a fortiori here: Congress has weighed the matter and "(i)t is not the province of state courts to strike a balance different from the one Congress has struck." 439 U.S., at 590 (emphasis added).

Pre-emption, therefore, displaced asserted State court jurisdiction over military pensions and rendered judgments

void insofar as they awarded a community interest therein to the non-servicemember spouse.

CONCLUSION

For these reasons, the Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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February 24, 1982

Appendix

APPENDIX A

(Decision of Court of Appeal on Rehearing with Two Modifications)

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re the Marriage of LAURA LEE and ROBERT MONROE SHELDON	
LAURA LEE SHELDON, Petitioner and Respondent, v. ROBERT MONROE SHELDON, Respondent and Appellant.	4 Civ. No. 22645 (Super. Ct. No. D 136107)

APPEAL from a judgment of the Superior Court of San Diego County, Carlos A. Cazares, Judge. Affirmed.

William E. Blatchley for Appellant

Nancy H. Flick for Respondent.

Robert Monroe Sheldon appeals an interlocutory judgment dissolving his thirteen year marriage.

The principal issue concerns the retroactivity of the United States Supreme Court's recent decision in McCarty v. McCarty (1981) 453 U.S. --- [101 S.Ct. 2728] and its applicability to cases not final on appeal as of the date McCarty was filed. We stress our decision is not meant to be a holding for all seasons resolving all the issues precipitated by McCarty. We only answer the narrow issue before us, concluding (1) the principles enunciated by the Supreme Court which govern the retroactivity of high court decisions mandate McCarty not be accorded full retroactivity, and (2) McCarty should not be applied to cases not final on appeal unless the military spouse requested the trial court reserve jurisdiction on the character of

the property interest in the pension or timely raised and briefed the federal preemption issue on appeal.[1]

Factual and Procedural Background

The principal assets at issue in this dissolution proceeding were the family residence and Robert's United States Navy Pension.[2] The trial court found the value of the residence to be $65,750 and the

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[1]An unarticulated, but sensitive issue permeating this case is the effect of our holding on the practicing bar. Other than indicating we have carefully considered the fallout aspect of this case and speculated on the fallout in cases which may follow, we feel it inappropriate to comment further on issues which are not before us.

[2]Robert admitted at trial, both personally and through his attorney, that his military pension rights constituted community property.

value of the pension to be $116,996. It awarded all the benefits due under the pension to Robert and the entire interest in the residence to Laura. Laura waived any difference in value of the respective properties.

Initially, on appeal, Robert challenged the actuarial valuation of his pension and the trial court's decision not to award each party a one-half interest in each of the assets. He did not contest the characterization of the pension rights as community property.

On June 8, 1981, we filed our unpublished opinion in this case, upholding the valuation of the pension and the distribution scheme. On June 26, the United States Supreme Court filed its decision in McCarty v. McCarty, supra, 453 U.S. ---, holding that federal law precludes a state from characterizing a military pension as community property in

order to divide it between the parties on dissolution of the marriage.

Robert then filed a petition for rehearing, arguing McCarty compels us to reverse the interlocutory judgment and remand for a new division of the community property and a recharacterization of Robert's pension rights as his separate property. Laura countered that the stipulation at trial coupled with Robert's express failure to contest the community nature of the pension rights on appeal rendered the McCarty holding inapplicable to the instant case.[3] We granted a

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[3]Appellant's opening brief, filed in this court on March 20, 1981, contained the following statements: "Military retirement pay constitutes community property to the extent earned during the marriage. [Citation.] [¶] Appellant herein does not contest the fact that petitioner is entitled to a portion of his retirement pay. Said fact was stipulated at trial . . . ."

The United States Supreme Court granted certiorari in McCarty on October 16, 1980. (See 449 U.S. 917.)

rehearing to address several problems inherent in the application of McCarty to California dissolution proceedings.

Retroactivity of McCarty

We must first concern ourselves with the degree of retroactivity to be accorded the McCarty decision. If McCarty is fully retroactive, Robert is entitled to receive the benefits of the decision, and the effect of the stipulation and failure to raise the issue on appeal become irrelevant.

The United States Supreme Court has had numerous occasions to review the question on propsective versus retroactive application of a judicial decision. (See, e.g., England v. Louisiana State Bd. of Med. Exam. (1964) 375 U.S. 411, 422; Linkletter v. Walker (1965) 381 U.S. 618; Stovall v. Denno (1967) 388 U.S. 293, 296-301.) Most recently, in Chevron Oil Company v. Huson (1971)

404 U.S. 97 (hereinafter Huson),[4] the Court discussed the issue at some length, identifying three factors to be considered:

(1) whether "the decision to be applied nonretroactively . . . establish[es] a new principle of law, either by overruling clear past precedent on which litigants may have relied, [citation] or by deciding an issue of first impression whose resolution was not clearly foreshadowed, [citation]";

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[4]Huson involved the retroactivity of the Court's decision in Rodrigue v. Aetna Casualty and Surety Company (1969) 395 U.S. 352, holding that a state's applicable statute of limitations, rather than the admiralty doctrine of laches, governed an action for injuries sustained while plaintiff was working on an oil drilling rig operating on the Outer Continental Shelf of Louisiana's Gulf Coast.

(2) whether the "history . . . purpose and effect" of the rule mandates restrospective [sic] operation; and

(3) whether retroactive application of the rule "'could produce substantial inequitable results . . .," injustice or hardship" . . . .' [Citation.]" (Id., at pp. 106-107.)[5]

Applying this standard to the McCarty decision, we are convinced that McCarty should not be accorded

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[5] In Stovall v. Denno, supra, 388 U.S. 293, 297, the Court set out a similar test for application to retroactivity questions involving constitutional rules of criminal procedure: "The criteria guiding resolution of the question implicates (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." The similarity of this test to the factors enunciated by the Court in Huson strongly suggests that retroactivity questions in all areas involve like considerations.

fully retroactive effect. McCarty presented an issue of first impression for the United States Supreme Court. Although the majority opinion relied on the two-year-old decision in Hisquierdo v. Hisquierdo (1979) 439 U.S. 572 for support, Hisquierdo involved an entirely different statutory scheme and clearly did not mandate the McCarty holding. (See In re Marriage of Milhan (Milhan II) (1980) 27 Cal. 3d 765, 772-777; Gorman v. Gorman (1979) 90 Cal.App. 3d 454, 460-462.) Moreover, McCarty effectively overrules consistent and well-settled California precedent holding a military pension constitutes community property, the divisibility of which on dissolution is not preempted by federal statute. (See, e.g., French v. French (1941) 17 Cal. 2d 775, 778, overruled on other grounds in In re Marriage of Brown (1976) 15 Cal. 3d 838; In re Marriage of

Fithian (1974) 10 Cal. 3d 592, cert. den. 419 U.S. 825; In re Marriage of Milhan (Milhan I) (1974) 13 Cal. 3d 129, 131; In re Marriage of Stenquist (1978) 21 Cal. 3d 779, 782. A state supreme court enjoys a position equal to that of lower federal courts where questions of federal statutory and constitutional law are involved, and is bound only by the contrary rulings of the United States Supreme Court on such issues. (See Rohr Aircraft Corp. v. County of San Diego (1959) 51 Cal. 2d 759, 764-765, revd. on other grounds (1960) 362 U.S. 628; People v. Estrada (1965) 234 Cal. App. 2d 136, 145.) Just as the Huson court concluded retroactivity was inappropriate because the court's previous decision in Rodrigue, supra, "overruled a long line of decisions by the Court of Appeals for the Fifth Circuit" (404 U.S. at p. 107), so we conclude retro-

active application of McCarty is unwarranted since the Supreme Court's decision overruled a long line of California Supreme Court cases which had definitively spoken on the issue.

Similarly, our review of the rationale underlying the McCarty decision does not convince us that retroactive application is mandated. The majority opinion notes two primary purposes of the military pension plans which community property division threatened to undermine. First, Congress has sought "to provide for the retired service member, and to meet the personnel management needs of the active military forces." (453 U.S. at p. --- [101 S.Ct. at p. 2741].) In discussing this objective of providing for the

retired service member,[6] the majority emphasizes that "the community property division of retired pay may disrupt the carefully balanced scheme Congress has devised to encourage a service member to set aside a portion of his or her retired pay as an annuity for a surviving spouse or dependent children." (Ibid.) While a purely prospective application of McCarty may have the effect of discouraging some already-divorced-but-not-yet-retired

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[6]Without discussion, the court also summarily remarked, "[s]tate courts are not free to reduce the amounts that Congress has determined are necessary for the retired member." (453 U.S. at p. --- [101 S.Ct. at p. 2741].) It is difficult to accept and apply the proposition that the amount of a retiree's pension is in any sense based on a Congressional determination of his "need." Pension amounts are calculated on a percentage of active duty pay, which is in turn dependent on the service member's rank and grade. These amounts have little or no relationship to need, being compensation for past services rendered. In all probability, Congress intended both active duty pay and military pensions as compensation entitlements. (Cf. Estate of Worley (1948) 87 Cal. App. 2d 760, 764-765.)

service members from electing to fund an annuity, the number of factors which must affect such a decision make the potential effect speculative at best.[7] Commenting on the second obejetive, the court said that "the military retirement system is designed to serve as an inducement for enlistment and reenlistment, to create an orderly career path, and to ensure 'youthful and vigorous' military forces." (Id., at p. ____ [101 S.Ct. at p. 2742], fn. omitted.) Potential division of the military pension, allegedly diminishes "'[o]ne of the inducements selected, [citation] to make . . . military service attractive" as well as "discourag[ing]

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[7]Even a purely prospective reading of McCarty will apply to all service members not yet divorced. Those members already divorced who have already retired are ineligible to elect to fund an annuity (see 10 U.S.C. §§ 1431(b) and 1448(a)); thus, any Congressionally-ordained incentive will have no effect as to them.

retirement by reducing the retired pay available to the service member, . . ." (Ibid.) It is clear that the concept of an inducement operates prospectively as to potential enlistees and reenlistees. A non-retroactive application of McCarty would do no harm to this asserted federal interest. As to the discouraging retirement rationale, the argument assumes the service member is not yet retired. Many members subject to pre-McCarty divorce decrees, however, have already retired and the pension incentive is inapplicable to them. Moreover, even as to those divorced members who have not yet retired, community property division of pension rights discourages retirement only to the extent the pension was actually divided in kind; if the non-service member spouse received an off-setting award of other community property in exchange for the pension rights, as in the present case, a

failure to apply McCarty retroactively will not discourage retirement of that service member. We thus conclude that the harm to federal interests which would be occasioned by a purely prospective application of McCarty is minimal. Rather, the Congressional purposes articulated by the McCarty majority can be adequately served even if the decision is not given retroactive effect.

While review of the first two factors identified in Huson's discussion of retroactivity does not indicate McCarty should be accorded retroactive effect, examination of the third factor -- the potential for injustice and hardship -- convinces us the Court's decision should not be applied to judgments which were final before McCarty was filed. In perhaps no other area of law is the need for stability and finality greater than marriage and family law. Without guessing

as to how our society may structure future social relationships (cf. Marvin v. Marvin (1976) 18 Cal. 3d 660), at this stage of our societal development, marital dissolution is almost by definition a mentally, emotionally, and often physically disruptive experience for the parties involved. Divorce inevitably requires old plans be abandoned, new plans made, and perceptions altered to conform to a changed reality. To permit and in fact encourage the relitigation of property interests long after the issues were supposedly settled would merely serve to re-open old wounds and create n[illegible]es. There is no guarantee that the non-service member spouse would have assets sufficient to reimburse the service member for that portion of the pension rights which had previously been an awarded share of community property. Substantial hardship would result in

cases where the non-member relied on the property settlement in converting his or her share into non-liquid assets. Moreover, a reallocation of property interests would likely constitute sufficient "changed circumstances" to trigger a second round of relitigation involving spousal support awards. (See generally, In re Marriage of Kuppinger (1975) 48 Cal. App. 3d 628, 633; Verner v. Verner (1978) 77 Cal.App. 3d 718, 727; but cf. In re Marriage of Cobb (1977) 68 Cal.App. 3d 855, 860-861.) We also note the immense burden on the administration of justice in our civil courts were such relitigation permitted.[8] Under these circumstances, we conclude that a fully retroactive application of McCarty would be inimical to the

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[8]As we noted previously (fn. 4, ante), the United States Supreme Court has indicated that recognition of this burden is an appropriate consideration in determining the degree of retrospectivity to be accorded a court decision.

principles of equity and fairness which underlie this state's family law system. Finding nothing in the nature or rationale of the McCarty decision which mandates a retroactive effect, we hold McCarty is inapplicable when the property rights in the military pension have been determined by a dissolution judgment which became final before the filing of the United States Supreme Court's opinion. (See In re Marriage of Brown, supra, 15 Cal. 3d 838, 851 and fn. 13.)

Application of McCarty to Cases Not Final on Appeal

Having concluded McCarty is not fully retroactive, we must now concern ourselves with Robert's contention that the principle of limited retroactivity should be invoked to apply the McCarty holding to all cases not final on appeal. (See In re Marriage of Brown, supra, 15 Cal. 3d at p. 851). In doing so, we

are not unaware that the facts of this case present only the tip of an iceberg-like issue which will have ramifications for litigants, attorneys, and the legal system in general. (See generally, 1981 Cal. Family L.Rep. 1650, 1658-1662.) As part of the adjudicative system, this court should not anticipate and resolve the possible issues that may yet arise in the myriad of cases at various stages of the legal process which may be affected by the McCarty decision. We are also cognizant of pending legislation in both houses of Congress aimed at negating the impact of McCarty. (See 453 U.S. at p. ---, fn. 25 [101 S.Ct. at p. 2740].) Accordingly, we limit our discussion in this case to cases in which an appeal was filed before the McCarty decision, and do not consider issues such as the resolution of post trial motions addressed to the trial court which may involve

different equitable considerations. (See e.g., Civ. Code, §§662 and 663).

We have no quarrel with applying McCarty to cases not final on appeal where the federal preemption issue was argued by the service member-spouse in the trial court and where the issue was raised on appeal.[9] That is not the case here. As we noted previously (fn. 1, ante), Robert stipulated to the community nature of the pension rights in the trial court and expressly re-affirmed that stipulation on appeal, some five months after the United States Supreme Court granted certiorari in McCarty. (See fn. 2, ante.)

---

[9]We thus anticipate that the service member-spouse in Milhan v. Milhan (1981) --- U.S. --- [101 S.Ct. 3152], in which the United States Supreme Court granted certiorari and remanded to the California Supreme Court for reconsideration in light of McCarty, will be accorded the benefits of the new rule since the federal preemption issue was raised on appeal. (See In re Marriage of Milhan (Milhan II), supra, 27 Cal. 3d 765.)

We begin our analysis with the well-settled proposition that an appellate court may consider as waived any issues not raised in the appellant's opening brief. (E.g., Title G. & T. Co. v. Fraternal Finance Co. (1934) 220 Cal. 362, 363; People ex rel. D. of P. Wks. v. McCullough (1950) 100 Cal. App. 2d 101, 106; Universal Ins. Co. v. Manhattan M. Line (1947) 82 Cal.App. 2d 425, 428.) An equally important corollary to this rule states that a petition for re-hearing is an inappropriate occasion to raise arguments not pursued in the original appeal. (E.g., People ex rel. Dept. of Public Works v. Mascotti (1962) 206 Cal.App. 2d 772, 779-780; Sanders v. Howard Park Co. (1948) 86 Cal.App. 2d 721, 723; Merchants' Ice etc. Co. v. Globe Brew. Co. (1946) 73 Cal.App. 2d 828, 838.) Robert contends, however, these rules should not

be applied in situations where a definitive higher court opinion declaring a new rule of law is announced after the appellant has filed his opening brief but before the expiration of the appellate court's jurisdiction.

The issue thus presented is not one which has frequently appeared in reported California decisions. Consideration of arguments not timely raised has generally been thought to lie within the discretion of the appellate court. Such discretion appears to have been exercised in Rayner v. Ramirez (1958) 159 Cal.App. 2d 372, when as issue raised by letter after the filing of briefs was based on a just-filed Supreme Court case which overruled well-settled precedent. The Rayner court concluded, "Under the circumstances there appears to be good reason for the failure of plaintiffs to raise the point in their opening brief." (Id., at p. 375.)

On the facts of the instant case, we are unable to reach a similar conclusion. Our view is based on several separate considerations.

First, the Supreme Court's decision to grant certiorari in McCarty preceded the filing of Robert's opening brief by five months. (See 449 U.S. 917.) His brief, however, expressly reaffirmed his previous stipulation to the community nature of his pension rights. Since the original stipulation was entered into before the grant of certiorari, it may be that such action was excusable. After the grant of certiorari, however, Robert should have argued on appeal or in a separate motion to the trial court that continued enforcement of the stipulation would be unjust in light of the United States Supreme Court's action. Having failed to pursue either of these alternatives, it is not unfair that

Robert continue to be bound by his original agreement.

Second, the unique nature of the marital institution and the community property concept suggests that the finding of a community interest in the pension rights not be disturbed at this point in the litigation.[10] As we

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[10]Community property is a concept of considerable fluidity and flexibility, recognizing the unique nature of each marital combination. It thus differs considerably from other legal characterizations of property interests. Separate property of the spouses is readily convertible to community property and vice versa. (See 7 Witkin, Summary of Cal. Law (8th ed. 1974) Community Property, §71, p. 5159.) No particular formalities are required for such a conversion, which may be accompanied by simple oral agreement. (Beam v. Bank of America (1971) 6 Cal. 3d 12, 25; Haseltine v. Haseltine (1962) 203 Cal.App. 2d 48, 58.) No consideration independent of the consent of the parties is needed. (Civ. Code, §4802; Estate of Wilson (1976) 64 Cal.App. 3d 786, 798.)

The same factors which argue in favor of a flexible community property concept also make it difficult to evaluate Robert's failure to contest the community nature of his military pension rights. Litigants often stipulate to conclusions or fail to

noted earlier (p. 10, ante), finality in dissolution proceedings is extremely important from the standpoint of the human beings involved. In situations where a partition judgment is severable, this finality principle indicates that appeal of one portion of the judgment does not necessarily stay operation of other parts. (Cf. Harrold v. Harrold (1954) 43 Cal. 2d 77; In re Marriage of Steinberg (1977) 66 Cal.App. 3d 815, 820-821.) If mere pendency of appellate jurisdiction permitted the raising of the

---

pursue technically meritorious legal arguments due to personal values and attitudes toward equity or responsibility. This is particularly true in dissolution proceedings where the parties may have many reasons to attempt to limit the animosity engendered by the litigation process. We thus may only evaluate the validity of a stipulation or decision not to contest based on what the party should have known regarding the state of the law.

pension rights issue, previously unstayed portions of the judgment might well be affected. The interests of the parties or society are not served by the disruption of plans and expectations which could result. In addition, it seems anomolous to allow the rights of litigants to turn on the fortuity that an appeal on an unrelated issue was filed, thus preventing the judgment from becoming final. Here, for example, Robert's original grounds for appeal concerned an alleged abuse of discretion by the trial court. We had little trouble in disposing of this contention in our first opinion. (See pp. 18-19, post.) Had Robert accepted the trial court's conclusion, as well he might have, the judgment would long since have become final. The result would be even more anomolous had Laura filed a meritorious appeal which was followed by Robert's petition for

rehearing raising the McCarty issue.

Finally, we note that additional support for our conclusion is provided by the recent decision of the Second District Court of Appeal in In re Marriage of Mahone (1981) --- Cal.App. 3d --- [176 Cal.Rptr. 274].[11] On facts virtually identical to those of the instant case, the Mahone court indicated,

> "The stipulation was in accordance with the law as it then stood, and Husband is not entitled to relief from the stipulation merely because the law was subsequently changed by judicial decision. [Citations.]" (Id., at p. --- [176 Cal.Rptr. at p. 276].)

---

[11] We note that a petition for hearing, filed October 5, 1981, is pending before the California Supreme Court. Nevertheless, Mahone and the instant case will hopefully provide some consistent guidance for the family law bar of the state.

Accordingly, we conclude that the holding in McCarty is inapplicable to cases where a service member-spouse stipulates to the community nature of his or her pension rights at trial, and does not timely contest such characterization on appeal.

Alleged Abuse of Discretion by the Trial Court

Robert's additional contentions do not require extensive discussion. He first claims the court abused its discretion in awarding all of his retirement benefits to him and the entire community interest in the family residence to his wife instead of equally dividing those assets in kind.

At trial, William F. Marples, a consulting actuary, testified the community interest in Robert's naval pension was $116,996. In reaching his conclusion he used an interest rate of 6% and an

increase in cost of living of 5%. Robert says the use of these factors amounts to speculation and accordingly the valuation reached was wrong. Admittedly, all actuarial determinations involve some uncertainty. Nevertheless, a trial court has the ability to determine the credibility of an expert's opinion including the reasonableness of underlying factors used in forming that opinion. The court's acceptance of Marple's testimony was within its discretion. (See In re Marriage of Skaden (1977) 19 Cal. 3d 679, 688-689.)

As noted previously, the court awarded Robert all the benefits due under his naval pension ($116,996), and awarded Laura the entire interest in the family residence ($65,750 net). A court is not required to divide community property equally in kind. (In re Marriage of Connolly (1979) 23 Cal. 3d 590, 603.)

> "[T]he asset distribution method of dividing community property is a permissible means of complying with the mandate of [Civil Code] section 4800. [Citations.]" (In re Marriage of Fink (1979) 25 Cal. 3d 877, 886.)

In light of the circumstances of the parties and the effect of uprooting children, ages 12 and 8, the court was well within its discretion in awarding her the house, particularly here, where Laura was willing to pay a premium for that division.

Robert also says the court abused its discretion in awarding $50 monthly as spousal support. On a record which reflects Laura's take home pay of about $125 weekly, while Robert had a net monthly income of around $1,035, the court acted within its discretion. (See In re Marriage of Morrison (1978) 20 Cal. 3d 437.)

Disposition

Judgment affirmed.

CERTIFIED FOR PUBLICATION.

_____
WIENER, J.

WE CONCUR:

_____
BROWN, P.J.

_____
WORK, J.

COURT OF APPEAL-STATE OF CALIFORNIA

FOURTH APPELATE DISTRICT

DIVISION ONE

In re the Marriage of LAURA LEE and ROBERT MONROE SHELDON	)
LAURA LEE SHELDON, Petitioner and Respondent,	)
v.	) 4 Civ. No. 22645
ROBERT MONROE SHELDON, Respondent and Appellant.	) (Super. Ct. No. D 136107)

THE COURT:

Modification of Opinion

1) The Civil Code cite on the last line of the first paragraph on page 12 should be Code of Civil Procedure, sections 662 and 663.

2) In the 9th line of Footnote 10 on page 15, the word "accompanied" should read "accomplished."

Acting Presiding Justice

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Nancy H. Flick, Esq.

COURT OF APPEAL-STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

In re Marriage of Sheldon LAURA LEE SHELDON	)	
Respondent,	)	4 Civ. No. 22645
v.	)	SUPERIOR COURT NO. D 136107
ROBERT MONROE SHELDON, Appellant.	)	

Second Modification of Opinion

BY THE COURT:

1) The second paragraph of footnote 3 on page 4 is modified to read as follows: "On October 16, 1980, the U.S. Supreme Court announced it had postponed consideration of jurisdiction in McCarty pending a full hearing of the case on the merits. (See 449 U.S. 917.)"

2) The first two lines on page 9 should read: "military pension, allegedly diminishes 'one of the inducements selected to make military service'". . .

3) The sixth line on page 13 should read: "months after the United States Supreme Court announced a hearing" . . .

4) The first line of the last paragraph on page 14 should read:

"First, the Supreme Court's decision to hear" . . .

5) The third and fourth lines on page 15 should read: "into before the hearing was announced, it may be that such action was excusable. After the October 16 announcement, however, Robert" . . .

_____
Presiding Justice

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Nancy H. Flick, Esq.

APPENDIX B

CIVIL NO. _____

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

In re the marriage of	)	
	)	
LAURA LEE SHELDON,	)	
	)	
Plaintiff and	)	
Respondent,	)	CIVIL NO. _____
	)	
v.	)	
	)	
ROBERT MONROE SHELDON,	)	
	)	
Defendant and	)	
Appellant.	)	
	)	

PETITION FOR HEARING

On Appeal from the Judgment of the
Superior Court of the State of California
San Diego County

Honorable CARLOS A. CAZARES, Judge

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IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

In re the marriage of	)	
	)	
LAURA LEE SHELDON,	)	
	)	
Plaintiff and	)	
Respondent.	)	CIVIL NO. _____
	)	
v.	)	-
	)	
ROBERT MONROE SHELDON,	)	
	)	
Defendant and	)	
Appellant.	)	
_____	)	

PETITION FOR HEARING

On Appeal from the Judgment of the Superior Court of the State of California San Diego County

Honorable Carlos A. Cazares, Judge

To the Honorable Rose Bird, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the State of California:

Appellant hereby petitions for a hearing to consider the decision of the Court of Appeal of the State of California, Fourth Appellate District, Division One, filed in this action on June 8, 1981, affirming the judgment of the trial court in favor of Respondent. A copy of the decision of the court of appeal showing the date of its filing is set forth herein as Appendix "A".

Hearing by this Court is necessary on the ground that the decision of the Court of Appeal is not in line with the authorities cited herein and this Court's ruling is necessary to secure uniformity of decision and important questions of law are at issue herein requiring settlement by this Court, to wit: whether the Court of Appeal acted in excess of its jurisdiction.

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STATEMENT OF THE CASE

On February 9, 1979, Petitioner LAURA LEE SHELDON, filed a Petition for Dissolution of Marriage to Respondent, ROBERT MONROE SHELDON (CT 1-2). At the same time the Petition was filed, the Petitioner also filed a financial declaration (CT 3-6).

On February 26, 1979, Respondent filed his response to the Petition for Dissolution.

On June 22, 1979, Petitioner filed a second financial declaration (CT 9-12). On the same date, Respondent filed a financial declaration (CT 13-16).

The trial of the matter was held on June 22, 1979, without a jury, the Honorable Carlos A. Cazares presiding. The Court awarded child support in the amount of $150.00 per child per month (RT 57, lines 9-10), and retained jurisdiction over spousal support (RT 57,

lines 10-12). The matters of the division of the community residence and pension were taken under submission (RT 57, lines 13-14).

On July 25, 1979, the Honorable Carlos A. Cazares submitted his findings and entered judgment (CT 17) as to the community property as follows: Petitioner's community interest in the pension fund is approximately $58,498.00 (CT 18). Respondent's community interest in the family residence is approximately $32,875.00 (CT 18). Petitioner was awarded the family residence as her sole and separate property (CT 18) and Respondent was awarded the Navy Pension benefits as his sole and separate property (CT 18).

The stipulation and waiver of the parties was filed with the Court on February 6, 1980 (CT 20-23).

The Interlocutory Judgment of Dissolution of Marriage was filed on February 13, 1980 (CT 24-26).

On February 14, 1980, the Notice of Entry of Judgment was filed (CT 27).

Notice of Appeal from the judgment taken was filed by Respondent on April 7, 1980 (CT 28).

Attorney for Appellant mistakenly stated in his opening brief to the Fourth Appellate District Court of Appeal that Respondent's alleged entitlement to a portion of Appellant's military retirement pay had been stipulated at trial (Appellant's Opening Brief, p. 6). In fact, no such stipulation had occurred.

On June 8, 1981, the Court of Appeal upheld the order of the trial court.

On June 26, 1981, the United States Supreme Court filed its decision in McCarty v. McCarty, ____U.S.____, 101 S.Ct. 2728, 69 L.Ed. 2d 589, holding that state community property laws had been pre-empted under the Supremacy Clause of the United States Constitution insofar

as they purported to characterize military retired pay as community property.

Appellant then timely filed a Petition for Rehearing in the Court of Appeal in light of McCarty. Rehearing was granted, but the Court of Appeal again upheld the order of the trial court in its treatment of Appellant's retirement pay as community property. Sheldon v. Sheldon (1981) 4 Civ. No. 22645, 81 Daily Journal D.A.R. 2972.

CONTENTIONS ON APPEAL

Appellant's military retired pay cannot be treated as community property upon divorce due to the pre-emption of California state law by federal legislation.

ARGUMENT

I

THE DECISION OF THE COURT OF APPEAL SHOULD BE REVERSED BECAUSE THE UNITED STATES CONGRESS HAS PRE-EMPTED ALL STATE LAWS THAT TREAT MILITARY RETIRED PAY AS COMMUNITY PROPERTY.

Federal pre-emption of State statutes

is ultimately a question under the Supremacy Clause of the Federal Constitution. U.S. Const. Art. VI, cl. 2; 16 American Jurisprudence 2d Constitutional Law §291, p. 795. In McCarty v. McCarty, ____U.S.____, 101 S.Ct. 2728, 69 L.Ed. 2d 589 (1981), the United States Supreme Court reversed the First Appellate District California Court of Appeal which had upheld a trial court's award of an interest in a military pension to the serviceman's wife upon their divorce. The high court ruled that the application of State community property law to military pensions "conflicts with the express terms of the federal law and . . . sufficiently injure[s] the objectives of the federal program to require nonrecognition." 101 S.Ct., at 2735. Thus, a finding of pre-emption was justified. Ibid. More recently, the Court has reaffirmed the McCarty principle in Ridgway v. Ridgway,

42 CCH S.Ct. Bull. B241 (November 10, 1981). In Ridgway, the Court ruled that an insured serviceman's beneficiary designation under a life policy issued pursuant to the Servicemen's Group Life Insurance Act of 1965 (SGLIA), Pub.L. 89-214, 79 Stat. 880, prevails over a constructive trust imposed upon the policy by a state court decree at the behest of the serviceman's ex-wife. In reversing the judgment of the Supreme Judicial Court of Maine, the Court stated as follows:

> Notwithstanding the limited application of federal law in the field of domestic relations generally, see McCarty v. McCarty, ___ U.S. ___, ___ (1981) (slip op. 9-10; Hisquierdo v. Hisquierdo, 439 U.S. 572, 581 (1979); In re Burris, 136 U.S. 586, 593-594 (1890), this Court, even in that area has not hesitated to protect, under the Supremacy Clause, rights and expectancies established by federal rights. See McCarty v. McCarty, supra; Hisquierdo v. Hisquierdo, supra; Free v. Bland, 369 U.S. 663 (1962); Wissner v. Wissner, 338 U.S. 655 (1950); McCune v. Essig, 199 U.S. 382 (1905). Cf. Yiatchos v. Yiatchos,

376 U.S. 306, 309 (1964). While "[s]tate family and family-property law must do 'major damage' to 'clear and substantial' federal interests before the Supremacy Clause will demand that state law be overridden," Hisquierdo, 439 U.S., at 581, with references to United States v. Yazell, 382 U.S. 341, 352 (1966), "[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail." Free v. Bland, 369 U.S., at 666. See also Gibbons v. Ogden, 9 Wheat. 1, 210-211 (1824). And specifically, a state divorce decree, like other law governing the economic aspects of domestic relations, must give way to clearly conflicting federal enactments. McCarty v. McCarty, supra; Hisquierdo v. Hisquierdo, supra. That principle is but the necessary consequence of the Supremacy Clause of our national Constitution. Ridgway, supra, at B247-248.

Therefore, according to Ridgway, Congressional enactments, like the military retired pay statutes, "prevail over and displace inconsistent state law (emphasis supplied)." Ridgway, supra at B253. In Ex Parte Buckhannan, No. 04-81-00243-CV, Court of Appeals, Fourth Supreme Judicial

District of Texas (October 15, 1981), Justice Clark, speaking for the Court, explained as follows:

> In determining how McCarty affects the judgment under collateral attack before us [via application for writ of habeas corpus re contempt for failure to obey divorce decree order of payment of part of military pension to former spouse], it is essential to focus upon what the [Supreme] Court said, reduced to the plainest terms; i.e., that Congress to protect 'clear and substantial federal interests,' pre-empted state community property laws with respect to military retired pay prior to 1977 by enacting the military retirement statutes in question. By definition, pre-emption by specific Congressional enactment took place when Congress acted, in accordance with the statutory scheme. The Court, in its opinion of June 26, 1981, pre-empted nothing; it only considered, determined, and announced what Congress had already done. (emphasis supplied). Buckhannan, supra at pp. 5-6.

In the case at bar, the interlocutory judgment of dissolution was filed on February 13, 1980 (CT 24-26). In Paragraph 5 on page 2 of said judgment,

an interest in Appellant's Navy pension is purportedly adjudged in and awarded to Respondent Laura Lee Sheldon (CT 25). Yet McCarty determined that Congress had pre-empted the application of state community property laws prior to 1977. The judgment cannot stand. Congress had affirmatively deprived state courts of the power to enter such judgments long before the instant case ever came to trial.

The opinion in the Fourth District Court of Appeal below most unfortunately failed to address the all-important effect of pre-emption. Instead, the Court mistakenly concluded that the McCarty decision lacked "fully retroactive effect." Sheldon v. Sheldon (1981) 4 Civ. No. D136107, 81 Daily Journal D.A.R. 2972. The Fourth District Court cited the United States Supreme Court's limitation of the retroactive effect of Rodrigue v. Aetna Casualty and Surety Company (1969) 395 U.S. 352,

as announced in Chevron Oil Company v. Huson (1971) 404 U.S. 97 (hereafter Huson), re-examined the reasoning of the McCarty opinion in light of certain principles developed in Huson, and held that,

> McCarty is inapplicable when the property rights in the military pension have been determined by a dissolution judgment which became final before the filing of the United States Supreme Court's opinion. Sheldon, supra, p. 11, 81 Daily Journal D.A.R. at 2973.

However, neither Huson or Rodrigue had anything to do with Congressional pre-emption of state law. The Court in Rodrigue had merely decided which of two federal statutes - the Death on the High Seas Act, 41 Stat. 537, 46 U.S.C. §761, et seq. (hereafter "Seas Act") and the Outer Continental Shelf Lands Act, 67 Stat. 462, 43 U.S.C. §1331 et seq. (hereafter "Lands Act") - would govern a death or injury on an offshore oil-drilling rig for the purposes of limitations

periods. Because the Court in Rodrigue chose the Lands Act, which, by federal law, incorporated adjacent state statutes of limitation, whereas earlier Fifth Circuit decisions had applied the admiralty doctrine of laches through the Seas Act, a limited retroactive application of Rodrigue was deemed warranted in Huson. The Supreme Court simply chose one of two federal laws in Rodrigue; pre-emption played no role in either Rodrigue or Huson. It was, therefore, never mentioned.

Similarly, "retroactivity" was never mentioned in McCarty; nor was it discussed in the Court's most recent pronouncement in Ridgway. "Retroactivity" is wholly irrelevant when the Supreme Court rules that state laws have been pre-empted by federal statutes, for such Congressional enactments take effect when they are passed into law and signed by the President. If one accepts the reasoning of the Fourth

District Court below, then Congressional enactments, lawfully adopted, are held in abeyance, having no legal effect until the Supreme Court is given an opportunity to rule upon them. This reasoning makes the Supreme Court a "super-legislature" and destroys the very foundation of a government composed of three separate but co-equal branches. The Supreme Court would displace the President of the United States in his right and duty to sign legislation into law; such legislation would only "take effect" when the Supreme Court so ruled. Limited retroactive application of judicial decisions has its place and purpose in American jurisprudence; the temporary suspension of the pre-emptive effectiveness of valid federal legislation is neither, for the Supreme Court is powerless, under our system of government, to do so. Pre-emption cannot be avoided or delayed by any judicial calendar.

II

FEDERAL PRE-EMPTION OF STATE COMMUNITY PROPERTY LAWS RENDERS STATE JUDGMENTS VOID INSOFAR AS THEY PURPORT TO AWARD THE NON-SERVICE MEMBER SPOUSE AN INTEREST IN SAID MEMBER'S MILITARY RETIREMENT PAY.

A.

THE McCARTY APPEAL, AND THE SUPREME COURT'S DECISION THEREON, WAS BASED UPON THE APPELLANT HAVING CALLED INTO QUESTION THE VALIDITY OF THE CALIFORNIA STATUTE UNDER WHICH THE MILITARY PENSION WAS DIVIDED.

In McCarty, the Supreme Court explained how the appeal was properly at bar:

> Appellee contends that this is not a proper appeal because appellant did not call the constitutionality of any statute into question in the California courts. Our review of the record, however, leads us to conclude otherwise. McCarty, supra, 101 S.Ct., at 2734, fn. 12.

The Court noted appellant's contention in the state court that the Supremacy Clause "pre-empts all state community property laws" as applied to federal military retired pay, ibid, and that "California

courts are accordingly precluded by the Supremacy Clause from dividing such benefits." Ibid. Therefore, on the authority of Dahnke-Walker Milling Co. v. Bondurant (1921) 257 U.S. 282, the Court concluded that Colonel McCarty had brought a proper appeal. Ibid. In Dahnke-Walker, the Court noted that the appellant therein

> . . . did not simply claim a right or immunity under the Constitution of the United States, but directly insisted that as to the transaction in question the . . . statute was void, and therefore unenforceable, because in conflict with the commerce clause (emphasis added) . . . Id. at 288-289 (cited in McCarty, supra, 101 S.Ct., at 2734, fn. 12).

The question answered in McCarty was, therefore, whether California Civil Code Section 4800(a) was void, insofar as it purported to divide a military pension, because in conflict with federal military retirement statutes and pre-empted through the Supremacy Clause. The Court in Dahnke-Walker explained further:

> That the statute was not claimed to be invalid in toto and for every purpose does not matter. A statute may be invalid as applied to one state of facts, and yet valid as applied to another. (citations omitted.) Besides, a litigant can be heard to question a statute's validity only when and so far as it is being or is about to be applied to his disadvantage. (emphasis added.) (citations omitted.)
>
> . . .
>
> Our conclusion on the jurisdictional question is that, as the state court applied and enforced to the plaintiff's disadvantage a state statute which the plaintiff seasonably insisted as so applied and enforced was repugnant to the Constitution and void, the case is rightly here on writ of error (emphasis added). Id. at 289-290.

McCarty's reversal of the California Court of Appeal sustains the conclusion that Civil Code Section 4800(a) is void insofar as judgments based upon it purport to divide military pensions. The Texas Court of Appeals in Buckhannan concurred:

> Respondent argues that the judgment under attack in the case before us is at worst erroneous, and not void, and that the relief sought by relator is thus barred

by the doctrine of res judicata. We cannot agree. The court pointed out in McCarty that when Congress enacted the military retirement system, it acted pursuant to its express constitutional power over the armed forces; and the court observed further that 'in no area has the court accorded Congress greater deference than in the conduct and control of military affairs.' ___ U.S. at ___, 101 S.Ct. at 2743, 69 L.Ed. 2d at 608. When Congress has exercised its plenary power to deprive State courts of jurisdiction over a particular subject, judgments of State courts purporting to exercise jurisdiction over the preempted subject are 'nullities and vulnerable collaterally.' Kalb v. Feuerstein, 308 U.S. 433, 439 (1940).[4]

Footnote 4. The Kalb doctrine remains one of the few exceptions to the general rule that final judgments are not subject to collateral attack, even on grounds of lack of jurisdiction. The doctrine is rooted in the principle that collateral attacks on subject matter jurisdiction in preemption cases may serve an important policy extrinsic to the judicial system. The continuing vitality of the Kalb doctrine is reflected by its codification in the Restatement (Second) of Judgments. See Moore, Collateral Attacks on Subject Matter Jurisdiction: A Critique of the

Restatement (Second) of Judgments, 66 CORNELL L. REV. 534 (1981). Buckhannan, supra at 7.

The doctrine that collateral attack to challenge the jurisdiction of a state court will be allowed on the grounds that the policy underlying res judicata (that there should be an end to litigation) was outweighed by a strong federal policy that would be obstructed if the court were allowed to act in excess of jurisdiction, was explained in Kalb as follows:

> The states cannot, in the exercise of control over local laws and practice, vest State courts with power to violate the supreme law of the land. Id. at 439.

Kalb also repeated the principle that

> . . . a State court before which a proceeding is competently initiated may - by operation of supreme Federal law - lose jurisdiction to proceed to a judgment unassailable on collateral attack . . . Id. at 440, fn. 12;

and that

> . . . considerations as to whether the issue of jurisdiction was actually contested in the (State) Court, or whether it could have been contested, are not applicable where the plenary power of Congress . . . has been exercised as in this Act. Id. at 444.

Similarly, in United States v. United States Fidelity & Guar. Co. (1940) 309 U.S. 506, the Court permitted collateral attack of a judgment on a cross-claim against the United States, on the ground that since the United States had not waived its sovereign immunity, the court entering the judgment had no jurisdiction. The doctrine of sovereign immunity was held to outweigh the policy underlying res judicata. If such immunity could be waived "it would subject the Government to suit in any court in the discretion of its responsible officers. This is not permissible." Id. at 513.

In McCarty, the United States Supreme

Court emphasized the plenary power of Congress over military affairs. The Court explained, at 101 S.Ct., 2741, as follows:

> Under the Constitution, Congress has the power "(t)o raise and support Armies." "(t)o provide and maintain a Navy," and "(t)o make Rules for the Government and Regulation of the land and naval Forces." U.S. Const., Art. I, Section 8, cls. 12, 13, and 14. See generally Rostker v. Goldberg, ___U.S. ____, ____ (1981) (slip op. 5). Pursuant to this grant of authority, Congress has enacted a military retirement system designed to accomplish two major goals: to provide for the retired service member, and to meet the personnel management needs of the active military forces. The community property division of retired pay has the potential to frustrate each of these objectives.

And at page 2743 of 101 S.Ct.:

> We have very recently reemphasized that in no area has the Court accorded Congress greater deference than in the conduct and control of military affairs. See Rostker v. Goldberg, ___U.S. ____, at ____ (slip

> op. 5). Thus the conclusion that we reached in Hisquierdo (439 U.S. 572 (1979)) follows a fortiori here: Congress has weighed the matter and "(i)t is not the province of state courts to strike a balance different from the one Congress has struck." 439 U.S., at 590 (emphasis added).

Pre-emption, therefore, displaced asserted State court jurisdiction over military pensions and rendered judgments void insofar as they awarded a community interest therein to the non-servicemember spouse.

B.

BECAUSE CIVIL CODE SECTION 4800(a) IS VOID INSOFAR AS IT PURPORTS TO CHARACTERIZE MILITARY PENSIONS AS COMMUNITY PROPERTY, THE TRIAL COURT HERE-IN LACKED JURISDICTION TO AWARD AN INTEREST IN APPELLANT'S MILITARY PENSION TO RESPONDENT, RENDERING THAT PART OF THE DIVORCE DECREE VOID AND SUBJECT TO COLLATERAL ATTACK.

Civil Code Section 4800(a) confers subject matter jurisdiction upon California courts over community property in dissolution proceedings. McCarty held that this

statute was void, insofar as it purported to divide a military pension, because repugnant to the federal Constitution. The applicable rule in California, as stated in Mendoza v. Small Claims Court (1958) 49 Cal. 2d 668 at 670, is as follows:

> If a statute on which a court's jurisdiction in a proceeding depends is unconstitutional, the court has no jurisdiction in the proceeding (citations omitted).

Consequently, the judgment of a court lacking jurisdiction of the subject matter is void. David v. Myre (1964) 228 Cal. App. 2d 616, 618-619. Moreover, it is stated that

> (a) judgment absolutely void upon its face may be attacked anywhere, directly or collaterally, whenever it presents itself, either by parties or strangers. It is simply a nullity, and can be neither the basis nor evidence of any right whatever. Forbes v. Hyde (1866) 31 Cal. 342 at 347.

And where a court is wholly lacking in jurisdiction of the subject matter of

an action, "jurisdiction may not be conferred by consent, waiver, agreement, acquiescence or estoppel. (citations omitted)." Schlyen v. Schlyen (1954) 43 Cal. 2d 361 at 375. Therefore, jurisdiction over the military pension for the purposes of community division could not have been conferred by stipulation of the parties: "subject matter jurisdiction cannot be conferred by counsel approving an ultra vires order." In Re Blaze (1969) 271 Cal. App. 2d 210 at 217. Blaze, like the Texas court in Buckhannan, supra, overturned a contempt citation on writ of habeas corpus, because the trial court had lacked subject matter jurisdiction ab initio. Throughout the Fourth District's opinion herein, much is made of Appellant's "failure" to raise the issue of pre-emption in his opening brief. However, in Davis v. Myre, supra, the Court ruled as follows:

> The fact the question of jurisdiction was not raised at the trial or in the opening brief is not material as "it is the universal rule that jurisdiction of the subject matter cannot be conferred upon a tribunal by consent, and it follows that the parties cannot make an effective waiver of a lack of such jurisdiction.: (citation omitted). Id. at 618 (emphasis supplied).

Notwithstanding the above, a review of the record of trial in the case at bar does not reveal any "stipulation" to the community characterization of Appellant's military pension. At page 23 of the Reporter's Transcript, Appellant's attorney, Mr. Blatchley, merely stated that Appellant was "prepared to stipulate that the petitioner [Respondent on appeal] does have a community interest in [Appellant's] military retirement." (emphasis supplied). This statement cannot be characterized as anything more than an unaccepted offer to stipulate. Indeed, the trial judge himself never deemed the military pension

issue as stipulated. The court's findings, in pertinent part, read as follows:

> The parties entered into various stipulations including custody and rights of visitation of the minor children and distribution of certain community assets, leaving for the Court to determine disposition of the following issues:
>
> 1. Child support
> 2. Spousal support
> 3. Navy pension
> 4. Family residence.
>
> (CT 17, emphasis supplied).

The aforesaid offer to stipulate was, at best, made contingent upon the trial court's ordering an equal division of the monthly retirement checks, not an offsetting award of the family residence to Respondent (RT 50-55). Moreover, having timely appealed the judgment of the trial court awarding such offset, Appellant has preserved appellate jurisdiction over the issue of his retirement pay, notwithstanding the remedies available to him by collateral attack.

Although Appellant originally argued on appeal that the offsetting award was calculatively erroneous, said offset is wrong for another reason as well. McCarty reiterated that military pay could not be attached so long as it was in the Government's hands. McCarty, supra, 101 S.Ct., at 2739, citing Buchanan v. Alexander, 4 How. 20, 11 L.Ed. 857 (1846), and Applegate v. Applegate, 39 F.Supp. 887 (E.D. Va. 1941). The Court then concluded that

> [I]t is clear that the injunction against attachment is not to be circumvented by the simple expedient of an offsetting award. See Hisquierdo, 439 U.S., at 588, 99 S.Ct., at 811. McCarty, supra, 101 S.Ct., at 2739 fn. 22.

In Hisquierdo, 439 U.S. 572 (1979), the Supreme Court, at page 588, stated:

> An offsetting award, however, would upset the statutory balance and impair [the retiree's] economic security just as surely as would a regular deduction from his benefit check.

The foregoing renders irrelevant the testimony of William F. Marples, Respondent's actuarial expert witness. (RT 23-45).

III

THE UNITED STATES SUPREME COURT'S NOTATION OF POSTPONEMENT OF PROBABLE JURISDICTION AT 449 U.S. 917 IS IRRELEVANT TO THE ISSUES HERE ON APPEAL.

The Fourth District Court below placed primary significance in its assertion that "the Supreme Court's decision to grant certiorari in McCarty preceded the filing of [Appellant's] opening brief by five months. (See 449 U.S. 917)." Sheldon, supra, 4 Civ. No. 22645 at 14, 81 Daily Journal D.A.R., 2973. In fact, the Supreme Court never granted certiorari in McCarty; McCarty went up by appeal - no petition for certiorari had ever been filed. On November 4, 1981, the Fourth District admitted this error without comment in its one page "Second Modification of Opinion." What the Supreme Court had

done was to postpone probable jurisdiction in McCarty pending a hearing on its merits. See 449 U.S. 917. Such postponement is an act the Supreme Court can only perform pursuant to its appellate jurisdiction, not via jurisdiction through certiorari. Title 28 United States Supreme Court Rules (Revised) Part IV. Jurisdiction on Appeal, Rule 16(7). Therefore, McCarty's jurisdiction in the Supreme Court was finally engaged through 28 U.S.C. §1257(2):

> By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

However, because jurisdiction was postponed in McCarty, the notice of hearing of the merits had no precedential value whatsoever. In fact, it was not until the opinion was actually rendered

that jurisdiction had been determined. McCarty, supra, 101 S.Ct., 2734 at fn. 12: "Accordingly, we conclude [present tense] on the authority of Dahnke-Walker that this is a proper appeal (emphasis supplied)." The Fourth District Court, without any cited legal authority, nonetheless concluded that although McCarty should not be retroactively "applied" to cases that had become final prior to the filing of the Supreme Court's opinion, it would be "applied" retroactively against Appellant, whose judgment was not final, effectively to the date of the Supreme Court's notice of hearing of merits. Sheldon, supra, 4 Civ. No. 22645 at 17, 81 Daily Journal D.A.R., at 2973. The Supreme Court has no "notice of rulemaking" procedures for cases and controversies, pending decisions on the merits, that bind litigants to suspend or modify their pursuits of remedies on appeal. (Cf. 5 U.S.C. 553(b) - rule-

making in federal administrative procedure). Moreover, the Fourth District's scholarly hindsight to the "meaning" of the Supreme Court's postponement of jurisdiction in McCarty lacks credence in light of that Appellate Court's statement below that California law was "well-settled" (Sheldon, supra at 6, 81 Daily Journal D.A.R., at 2792) in the area of federal pre-emption, when all that California courts had to rely upon were United States Supreme Court denials of certiorari that lack any precedential value nor imply any inference concerning the Supreme Court's view of the merits. Hughes Tool Co. v. Trans World Air Lines, Inc. (1972) 409 U.S. 363, 366. The Fourth District Court's creative "estoppel" is certainly creative, but clearly without legal foundation.

CONCLUSION

The effect of McCarty's holding

(that state community property laws are pre-empted insofar as applied to military pensions) derives from an analysis of federal Constitutional law and the relation between the States and the federal government. Article 3, Section 1, of the Constitution of the State of California provides as follows:

> The State of California is an inseparable part of the United States of America, and the United States Constitution is the supreme law of the land.

The necessary corollary to this principle is that our own State courts "are, of course, constrained by the supremacy clause (U.S. Const. Art. VI, cl. 2) to follow decisions of the Supreme Court on matters of constitutional interpretation . . ." Calderon v. City of Los Angeles (1971) 4 Cal. 3d 251 at 258. Moreoever,

> (w)hen interpreting the federal Constitution, we (state courts) are bound by the high court's holding, notwithstanding state statutory presumptions to the

contrary. Id. at 264.

And in People v. Roth Packing Co. (1978) 85 Cal. App. 3d 308, the Court of Appeal, appraising California statutory meat labling requirements, noted as follows:

> . . . it is clear that the holding of the United States Supreme Court in Jones v. Roth Packing Co., supra, 430 U.S. 519, 530-532 (51 L.Ed.2d 604, 616-618), that the states may not enact labeling requirements which are "in addition to, or different than" those prescribed by the Wholesome Meat Act, is now stare decisis and binding on the courts of this state (emphasis added) (See Calderon v. City of Los Angeles (1971) 4 Cal. 3d 251, 264.) Id. at 324.

There is, then, no question that this court is bound by the decision in McCarty.

Furthermore, in United States v. Tyler (1881) 105 U.S. 244, cited with approval in McCarty at 101 S.Ct., 2736, the Court stated that military retired

pay is "compensation . . . continued at a reduced rate, and the connection is continued, with a retirement from active service only." United States v. Tyler, supra, at 245. The Tyler Court reasoned:

> It is impossible to hold that men who are by statute declared to be a part of the army, who may wear its uniform, whose names shall be borne upon its register, who may be assigned by their superior officers to specified duties by detail as other officers are, who are subject to the rules and articles of war, and may be tried, not by a jury, as other citizens are, but by a military court-martial, for any breach of those rules, and who may finally be dismissed on such trial from the service in disgrace, are still not in the military service. Id. at 246.

The earnings of a spouse while living "separate and apart" are separate property. Cal. Civil Code Sections 5118, 5119. Because presently earned, such military retired pay cannot be subject to community division after separation, much less after divorce. The court simply has no jurisdiction to divide or enforce a

purported division of current "separate-property" earnings.

The Fourth District Court below, in advancing the fiction of "non-retroactivity" of pre-emption in McCarty, attempted to subvert the effect of such pre-emption by labeling McCarty "inimical to principles of equity and fairness." Sheldon, supra, at 11, 81 Daily Journal D.A.R., 2793. The Supreme Court, in Ridgway, supra, has already responded to such a charge:

> We recognize that this unpalatable case suggests certain "equities" in favor of the respondent minor children and their mother. Sergeant Ridgway did have specific obligations to the children that were imposed by the 1977 divorce judgment of the Maine court. Those obligations concerned not only life insurance "now outstanding" for the benefit of the children, but also extended to their support, to clothing, to "medical, dental, and optical expense," and to certain loans and other indebtedness. App. 13-15. Ridgway, instead chose to name his then new wife as beneficiary of his SGLIA policy.[12]

A result of this kind, of

> course, may be avoided if Congress chooses to avoid it. It is within Congress' power. Thus far, however, Congress has insulated the proceeds of SGLIA insurance from attack or seizure by any claimant other than the beneficiary designated by the insured or the one first in line under the statutory order of precedence. That is Congress' choice. It remains effective until legislation providing otherwise is enacted (emphasis supplied). Ridgway, supra at B256-257.

As the United States Supreme Court observed in McCarty approximately 140 days ago:

> . . . Congress may well decide, as it has in the Civil Service and Foreign Service contexts, that more protection should be afforded a former spouse of a retired service member. This decision, however, is for Congress alone . . . Congress has weighed the matter, and "it is not the province of state courts to strike a balance different from the one Congress has struck." ____U.S. ____, 101 S.Ct. at 2743.

WHEREFORE, Appellant Robert Sheldon respectfully requests that for the reasons advanced, and on the authorities cited,

a hearing be granted and that this Court reverse the lower Court's ruling that the Appellant's United States Military Retirement Benefits were community property and remand the matter for further proceedings consistent therewith.

Respectfully submitted,

William E. Blatchley
Attorney for Appellant

APPENDIX C

(The order of the California Supreme Court denying Appellant's petition for a hearing appears in the Court's minutes for December 2, 1981. Those minutes are reprinted in the advance sheets of "California Official Reports," 1981, Number 35, Minutes, at p. 3 (December 29, 1981). The minutes will not appear in the bound version, known as "California Reports" 3d.)

MINUTES

SUPREME COURT [OF CALIFORNIA]

Los Angeles, December 2, 1981

. . .

(4 Civ. 22645 Div. 1) -- In re the Marriage of Sheldon, Sheldon v. Sheldon. [124 Cal.App. 3d 37] Appellant's petition for hearing denied.

APPENDIX D

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IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE

In re the Marriage of LAURA LEE SHELDON, Petitioner/Appellee, v. ROBERT MONROE SHELDON, Respondent/Appellant.	)	4 Civ. No. 22645

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that Robert Monroe Sheldon, the respondent and appellant named above, hereby appeals to the Supreme Court of the United States

from the final judgment of the Court of Appeal of the State of California, Fourth Appellate District, Division One, entered in this action on December 2, 1981, which affirmed the Superior Court's judgment dissolving the parties' marriage.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

William E. Blatchley
Attorney for Robert
Monroe Sheldon

APPENDIX E

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Article VI, clause 2:

> This Constitution, and the Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

California Civil Code §4800(a):

> Except upon the written agreement of the parties, or on oral stipulation of the parties in open court, the court shall, either in its interlocutory judgment of dissolution of the marriage, in its judgment decreeing the legal separation of the parties, or at a later time if it expressly reserves jurisdiction to make such a property division, divide the community property and the quasi-community property of the parties, including any such property from which a homestead has been selected, equally. For purposes of making such division, the court shall value the assets and liabilities as near as practicable to the time of trial, except that, upon 30 days' notice by the moving party to the other party, the court

for good cause shown may value all or any portion of the assets and liabilities at a date after separation and prior to trial to accomplish an equal division of the community property and the quasi-community property of the parties in an equitable manner.

Supplemental Brief

Supreme Court, U.S.
FILED
MAR 31 1982
ALEXANDER L. STEVAS
CLERK

81-1631

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 198_

No. _____

ROBERT MONROE SHELDON, APPELLANT

v.

LAURA LEE SHELDON, APPELLEE

ON APPEAL FROM

THE COURT OF APPEAL OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION ONE

MOTION FOR DAMAGES AND DOUBLE COSTS

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. _____

ROBERT MONROE SHELDON, APPELLANT

v.

LAURA LEE SHELDON, APPELLEE

ON APPEAL FROM
THE COURT OF APPEAL OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION ONE

MOTION FOR DAMAGES AND DOUBLE COSTS

Appellee Laura Lee Sheldon moves the Court for an award of appropriate damages, consisting of attorney's fees, and for double costs, pursuant to 28 U.S.C. sections 1912 and 2301, and Supreme Court Rules 49.2 and 50.7.

The grounds for this Motion are that Appellant's appeal was improvidently taken, no reasonable ground has been asserted for granting a petition for writ of certiorari, and Appellee has been unreasonably subjected to the expense of attorney's time and costs necessary to respond thereto. Slaker v. O'Connor (1929) 278 U.S. 188, 190; Wagner Electric Mfg. Co. v. Lyndon (1923) 262 U.S. 226, 233.

28 U.S.C. section 1912 provides:

> Where a judgment is affirmed by the Supreme Court or by a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs.

Damages in the form of attorney's fees, as well as double costs, may be awarded under section 1912 when an appeal is so without merit as to be considered frivolous or vexatious. Libby, McNeill &

Libby v. City National Bank (9th Cir. 1978) 592 F.2d 504, 514-515; Overmyer v. Fidelity and Deposit Co. of Maryland (2nd Cir. 1977) 554 F.2d 539, 543.

28 U.S.C. section 2301 is the companion of section 1912, providing for an award of damages and double costs where an improvidently taken appeal is also without reasonable merit when considered as a petition for writ of certiorari.

> Where [an improvidently taken appeal is regarded as a petition for writ of certiorari and] there appears to be no reasonable ground for granting a petition for writ of certiorari it shall be competent for the Supreme Court to adjudge to the respondent reasonable damages for his delay, and single or double costs.

Such damages are not limited to cases in which there has been a money judgment, but may be awarded whenever the Court finds it just and appropriate to compensate an appellee or respondent for the

expense of an unreasonable appeal. Wagner Electric Mfg. Co. v. Lyndon, supra, 262 U.S. 226, 233.

Appellee respectfully submits that this appeal was improvidently brought, and was so without merit as a petition for writ of certiorari as to be frivolous and vexatious. Appellee has incurred damages in the form of reasonable attorney's fees and costs, and requests that these be awarded to her.

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San Diego, California
92108

Attorney for Appellee

March 26, 1982

CERTIFICATE OF SERVICE BY MAIL

I declare that I have ~~applied for admission~~ been admitted to practice before this Court and that I represent the appellee herein.

My business address is 3456 Camino Del Rio North, Suite 200, San Diego, California, 92108.

On March 26, 1982, I served the within MOTION FOR DAMAGES AND DOUBLE COSTS on the interested parties in said cause by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Diego, California addressed as follows:

WILLIAM E. BLATCHLEY
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Telephone: (714) 232-3111

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225 Broadway, Suite 1600
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FRANK T. VECCHIONE
108 Ivy Street
San Diego, CA 92101

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on March 26, 1982 at San Diego, California.

Nancy H. Flick

Motion to Dismiss or Affirm

Supreme Court, U.S.
FILED
MAR 31 1982
CLERK

81-1631

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. _____

ROBERT MONROE SHELDON, APPELLANT

v.

LAURA LEE SHELDON, APPELLEE

ON APPEAL FROM
THE COURT OF APPEAL OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION ONE

MOTION TO DISMISS

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March 26, 1982

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. _____

ROBERT MONROE SHELDON, APPELLANT

v.

LAURA LEE SHELDON, APPELLEE

ON APPEAL FROM

THE COURT OF APPEAL OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION ONE

MOTION TO DISMISS

Appellee Laura Lee Sheldon moves to dismiss the appeal of Robert Monroe Sheldon from the final judgment of the Court of Appeal of California, Fourth District, Division One, following the California Supreme Court's denial of his petition for hearing.

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OPINIONS BELOW

The Court of Appeal issued its opinion on October 7, 1981, which was published. The First Modification of Opinion was filed on October 9, 1981. The Second Modification of Opinion was filed on November 4, 1981. (Appendix A, infra.) The California Supreme Court rendered no opinion when it denied

/ / /

Appellant's Petition for Hearing, (Appendix D, infra.)

STATEMENT OF THE CASE

The parties filed for dissolution of marriage on February 9, 1979, during which Appellant (Respondent below) offered to stipulate to the community property character of his military pension benefits. On July 25, 1979, the San Diego Superior Court entered Judgment ruling, among other things, that Appellee (Petitioner below) had a community interest in Appellant's military pension benefits, awarding the whole of said pension benefits to Appellant and as and for an offset awarding the community residence to Appellee.

The Interlocutory Judgment of Dissolution was filed on February 13, 1980, and Notice of Entry of Judgment on February 14, 1980. Notice of Appeal from

the Judgment was filed by Appellant on April 7, 1980, on the ground that the trial court had abused its discretion in offsetting the pension benefits with the community residence, and had abused its discretion in awarding $50 monthly as spousal support. On June 8, 1981, the Court of Appeal filed its opinion of decision (unpublished), upholding the trial court's order.

On June 26, 1981, this Court rendered its decision in McCarty v. McCarty, 453 U.S. ____. Appellant thereupon filed a Petition for Rehearing in the Court of Appeal, on the ground that McCarty ought to be applied to overturn the disposition of property by the trial court. Rehearing was granted, and both parties submitted letter briefs addressing the effect of the McCarty decision.

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On October 7, 1981, the Court of Appeal issued an opinion certified for publication, declining to disturb the trial court's order. A "Modification of Opinion" was filed on October 9, 1981, and a "Second Modification of Opinion" on November 4, 1981. Each made minor corrections.

On November 16, 1981, Appellant filed his Petition for Hearing in the Supreme Court of California. Appellee filed her Answer in Opposition to the Petition for Hearing on November 27, 1981.

On December 2, 1981, the California Supreme Court issued its Minute Order denying Appellant's Petition for Hearing. On February 26, 1982, Appellant filed a Notice of Appeal to the Supreme Court of the United States in the California Court of Appeal. Appellant's Jurisdictional

Statement, dated February 24, 1982, was received by Appellee on March 1, 1982.

THE APPEAL IS ERRONEOUSLY TAKEN

This appeal is erroneously taken under 28 U.S.C. section 1257(2), and does not come within this Court's appellate jurisdiction, for the following reason:

1. THE JUDGMENT BELOW DID NOT UPHOLD THE VALIDITY OF ANY STATE STATUTE THAT HAD BEEN CHALLENGED AS IN CONFLICT WITH FEDERAL LAW.

Appellant invokes this Court's appellate jurisdiction under 28 U.S.C. section 1257(2), which provides for an appeal from any final judgment of a state court of last resort wherein the validity of a state statute has been called into question under a federal constitutional provision, treaty, or law, and the statute's validity has been upheld. Appellant

states that he argued below that California Civil Code section 4800(a) as applied to him was invalid under the United States Constitution, and that "[t]he California courts have upheld the statute's validity." Appellant's Jurisdictional Statement, pp. 5-6.

On the contrary, the judgment below did not uphold the validity of section 4800(a) as applied, but merely refused to apply the decision of this Court in McCarty v. McCarty (1981) 435 U.S. ____ retrospectively to the parties before it. Nowhere in the decision below is there any attempt to say that section 4800(a) as previously applied to characterize Appellant's military pension as community propercy was or is still valid. What the appellate court was asked to decide was whether this recent change in the interpretation of section 4800(a) should

be applied to the parties before it on appeal to overturn a disposition of property which had been agreed upon by the parties and ordered by the trial court nearly two years previously, had been relied upon by them as settled since that time, and was only now subject to review because the case was still within its appellate jurisdiction on another ground entirely. (Appellate Court Opinion, Appendix A, pp. 37-38.)

The decision of the appellate court not to disturb the prior disposition of the property in no way involved an assertion that section 4800(a) as previously applied was still valid, but only that the policy factors and balance of hardships in the particular case before it did not favor a retrospective application of the new interpretation of section 4800(a) to these parties.

Therefore, because this decision does not come within 28 U.S.C. section 1257(2), nor within any other statutory ground for the appellate jurisdiction of this Court, the appeal should be dismissed. Appellee recognizes, however, that the Court must treat an erroneously made appeal as a petition for writ of certiorari, 28 U.S.C. section 2301, and thus addresses the issue of whether the questions Appellant presents satisfy the minimum jurisdictional requirements for a hearing by this Court. Addington v. Texas (1979) 441 U.S. 418, 422-423; May v. Anderson (1953) 345 U.S. 528, 530.

THE QUESTION IS NOT IMPORTANT

A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. Palmore v. United States

(1973) 411 U.S. 389, 396-397; Rice v. Sioux City Cemetery (1955) 349 U.S. 70, 73-74.

Generally, such review of state court decisions will only be granted when the state court has decided a federal question so as to conflict with the decision of another state court of last resort or of a federal court of appeals, or when the state court has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided a federal question so as to conflict with applicable decisions of this Court. Supreme Court Rule 17.1.

Appellee respectfully submits that Appellant's questions presented do not present any important question of federal law that should be settled by this Court, nor has the decision below decided a

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federal question so as to conflict with applicable decisions of this Court.

1. WHETHER A STATE APPELLATE COURT HAS MADE A PROPER OR IMPROPER APPLICATION OF THE COMMON LAW DOCTRINE OF STARE DECISIS IS NOT ITSELF A FEDERAL QUESTION.

Appellant contends that the court below was "constrained" to apply this Court's decision in McCarty v. McCarty, supra, to the parties before it on appeal, under the doctrine of stare decisis. Appellant's Jurisdictional Statement, pp. 9-11.

It is well-settled that state and federal appellate courts may decide for themselves whether and to what extent to make their own overruling decisions operate retrospectively upon cases that were filed or decided prior to the

overruling. Linkletter v. Walker (1965) 381 U.S. 618, 622-629; Great Northern Ry. Co. v. Sunburst Oil & Ref. Co. (1932) 287 U.S. 358, 364-366. An overruling court is not compelled to make its ruling apply retrospectively, even to the parties in the overruling case, and a decision not to do so, or to make it only partially retroactive, does not in itself raise any federal or constitutional issue.

Even where a federal right has been asserted and affirmed by the overruling decision, a choice to make the new rule apply prospectively only, or only partially retrospectively, does not violate the Constitution or the federal right involved, but is simply a recognition that, in American jurisprudence, the doctrine of stare decisis does not require fully retroactive operation of all judicial decisions, and that policy

considerations may dictate limits upon their retroactivity depending on the circumstances. Cipriano v. City of Houma (1969) 395 U.S. 701, 706; Chicot County Drainage Dist. v. Baxter State Bank (1940) 308 U.S. 371, 374-375; see also, Annotation, "United States Supreme Court's Views As To Retroactive Effect Of Its Own Decisions Announcing New Rules," 22 L.Ed.2d 821.

2. ABSENT DIRECTIONS FROM THE OVERRULING COURT, A LOWER APPELLATE COURT MAY DECIDE WHETHER TO APPLY THE OVERRULING DECISION TO THE PARTIES BEFORE IT, BASED UPON THE SAME CONSIDERATIONS THE OVERRULING COURT WOULD USE.

Where the overruling court does not indicate the extent to which its decision should operate retrospectively, a lower

appellate court may have to face and decide these questions. See Annotation, "Prospective or Retroactive Operation of Overruling Decisions," 10 A.L.R.3d 1371, sections 8(a)-(c), at 1398-1403. The traditional rule has been that an appellate court before whom a case is still on review when a new rule is announced ought to apply the new rule unless to do so would result in a manifest injustice. This is based on the view that a new judicial decision is new law, the same as if it were legislation, and that courts are obliged to apply the law as it exists at the time it renders its decision. See the discussion in Linkletter v. Walker, supra, 381 U.S. 618, 622-629. The more modern view, however, recognizes that an overruling court may have reasons for refraining from deciding on retrospectivity, and that therefore,

unless and until there is clarification from the overruling court, a lower court should reach its own conclusion on retrospective application of the new rule by weighing the same policy considerations that the overruling court would use. 10 A.L.R.3d 1371, at 1398-1399, and cases cited therein. In Chicot County Drainage Dist. v. Baxter State Bank, supra, a lower court had held that a recent overruling decision of the Supreme Court was inherently retrospective in operation:

> The courts below have proceeded on the theory that the Act of Congress, having been found to be unconstitutional, was not a law; that it was inoperative, conferring no rights and imposing no duties, and hence affording no basis for the challenged decree. [Citations.] It is quite clear, however, that such broad statements as to the effect of a determination of unconstitutionality must be taken with qualifications. The actual existence of a statute, prior

> to such a determination, is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects, -- with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination. These questions are among the most difficult of those which have engaged the attention of courts, state and federal, and it is manifest from numerous decisions that an all-inclusive statement of a principle of absolute retroactivity invalidity cannot be justified.
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> Id., 308 U.S. at 374 (emphasis added).

In recent years, this Court has refined the criteria it considers proper to use in making determinations of

retroactivity. Stovall v. Denno (1967) 388 U.S. 293, 297; Chevron Oil Co. v. Huson (1971) 404 U.S. 97, 106. In numerous decisions, this Court had also recognized and implicitly approved of the attempt on the part of the lower courts to determine retroactivity by these same criteria, in cases where it has left the question open. See, e.g., United States v. Peltier (1975) 422 U.S. 531, 535-537; Gosa v. Mayden (1973) 413 U.S. 665, 672-680; Simpson v. Union Oil Company (1969) 396 U.S. 13, 15. Thus, in deciding whether to apply the McCarty decision retroactively to the case before it by weighing carefully all the factors set out by this Court in Chevron Oil Co. v. Huson, supra, 404 U.S. 97, the California court has done nothing more than follow correct procedure under modern law. It was not "constrained" to apply McCarty by

stare decisis, but rather had an obligation to consider the policies behind the new rule and the circumstances of the case before it in order to determine whether retroactive application was called for.

The fact that McCarty announced that a state statute as applied was pre-empted by a federal statute does not change the lower court's obligation. Judicial pre-emption is a judicially-created doctrine based on the Supremacy Clause, and thus is simply a finding of a specific kind of unconstitutionality. See Tribe, American Constitutional Law (1978) sections 6-23 to 6-27, at 376-391. There is no reason, in federal or constitutional law, for holding that a decision announcing federal pre-emption must be inherently or automatically retrospective in operation, any more than a decision announcing the

unconstitutionality of a state statute under the Equal Protection or Due Process Clauses.

3. WHETHER STATE APPELLATE COURTS SHOULD APPLY McCARTY RETROSPECTIVELY TO CASES ON APPEAL IS NOT AN IMPORTANT FEDERAL QUESTION AND SHOULD BE LEFT TO THE JUDGMENT OF THE STATE COURTS.

Appellee respectfully submits that in McCarty this Court properly left the decision on retroactive application to the judgment of the appellate courts in each community property state, who are in the best position to determine the balance of the policy considerations and hardships in each case. The federal right involved--not to have military retirement pay treated as community property--is not a constitutional or

fundamental one, and the individual interest at stake is a financial one of varying importance depending upon the circumstances. The state's concern, on the other hand, is not only with the hardship to its judicial system that might result from opening the door to re-litigation of numerous community property dispositions already made, but also with the financial and emotional hardships such re-litigation could impose on the parties. As the court below pointed out, family dissolution proceedings involve a delicate balancing of many intangible interests, and property dispositions are inextricably interwoven with considerations of what is in the best interests of the parties and their children. (Appellate Court Opinion, Appendix A, pp. 59-62.) No across-the-board rule regarding retrospectivity

could do justice to this situation. This Cour refrained from imposing an across-the-board rule regarding retrospectivity when it decided McCarty, and should decline to do so now.

Cf. Kirschberg v. Feenstra (1981) ____ U.S. ____, 101 S.Ct. 1195, wherein this Court affirmed a decision of the 5th Circuit Court of Appeals, which had held a former Louisiana community property law invalid under the Equal Protection Clause but had limited the retrospective effect of its decision to the parties to the overruling case. The Circuit Court had done so on the ground that further retroactivity "would create a substantial hardship with respect to property rights and obligations within the State of Louisiana." 101 S.Ct. at 1198, quoting from the Circuit Court's decision at 609 F.2d 727, 735-736 (5th Cir. 1979).

4. THE CONTENTION THAT McCARTY RENDERED VOID ALL PREVIOUS STATE JUDGMENTS TREATING MILITARY RETIREMENT PAY AS COMMUNITY PROPERTY IS WITHOUT MERIT AND NO HEARING BY THIS COURT IS REQUIRED.

Appellant contends that the effect of the McCarty decision was to render void all pre- as well as post-McCarty judgments treating military retirement pay as community property. Jurisdictional Statement, pp. 13-21. He appears to base this contention on two grounds: (1) that it was inherent in the McCarty decision; and (2) that the McCarty decision comes within the Kalb doctrine exception to the finality of judgments rule. Appellee submits that neither of these arguments has any basis in law or authority.

A. THE McCARTY DECISION DID NOT HOLD THAT PREVIOUS JUDGMENTS TREATING MILITARY RETIREMENT PAY AS COMMUNITY PROPERTY WERE VOID.

The McCarty case was on appeal to this Court on the ground that California Civil Code section 4800(a), insofar as applied to treat military retirement pay as community property, was in conflict with pre-emptive federal law. The only use of the term "void" in McCarty occurred in the quotation from Dahnke-Walker Milling Co. v. Bondurant (1921) 257 U.S. 282, in a footnote explaining why it had jurisdiction of the case under 28 U.S.C. section 1257(2). 101 S.Ct. at 2734, fn. 12. Appellant attempts to turn this use of the term

"void," purely in reference to a ground for appeal and meaning simply "pre-empted," into a holding that, because the statute as applied was held to be pre-empted, all judgments previously rendered on its basis were void and subject to collateral attack. This creative conclusion can nowhere be found in McCarty, nor is there any basis for it in law or authority.

B. THE McCARTY DECISION DOES NOT COME WITHIN THE KALB DOCTRINE EXCEPTION TO THE FINALITY OF JUDGMENTS RULE.

Appellant attempts to find authority for his "voidness" argument in the decision of Kalb v. Feuerstein (1940)308 U.S. 433, which established an exception to the finality of judgments rule where a judgment had been rendered by a state

court which had, at the time of its judgment, no jurisdiction over the subject matter because such jurisdiction had been expressly pre-empted by previous Congressional act. 308 U.S. at 439.

In Kalb express language in the Frazier-Lemke Act provided that if a farmer-debtor filed for bankruptcy in federal court no other proceedings for foreclosure or sale of his property could be instituted or maintained in any other court. Kalb therefore held that the closure proceeding in the Wisconsin state court, even though it had become final, was void for lack of subject matter jurisdiction and could be collaterally attacked. This holding rested upon the finding of an express Congressional preemption of subject matter jurisdiction, not upon a judicial interpretation that

a state law as applied was pre-empted by federal law.

Ordinarily, final judgments are not subject to collateral attack even when they were rendered without proper subject matter jurisdiction. Restatement (2d) Judgments, Chapter 2, section 15 (Tentative Draft No. 6, 1979); Durfee v. Duke (1963) 375 U.S. 106, 114-115. The Court made the exception in Kalb because of Congress's plenary power over bankruptcy and its express intention to oust other courts of all jurisdiction.

A similar rationale underlay the decision in United States v. United States Fidelity and Guaranty Co. (1940) 309 U.S. 506, in which the policy behind the doctrine of sovereign immunity was held to outweigh the policy behind the finality of judgments rule, so that a judgment awarding damages against the

United States could be collaterally attacked as void. Id., at 514-515. The "doctrine" common to both of these decisions has been described as an exception based on the existence of "an important policy extrinsic to the judicial system" that needs to be served. Moore, "Collateral Attack on Subject Matter Jurisdiction: A Critique of the Restatement (Second) of Judgments," 66 Cornell L.Rev. 534 (1981) at 541-542. The only "policy extrinsic to the judicial system" to be served in this case is the policy announced in McCarty that military retirement pay ought to be exempt from division under community property laws. Important as this Court has found it to be, Appellee submits that this policy does not rise to the level of the policy of sovereign immunity so as to justify allowing collateral attack on final

judgments rendered prior to McCarty. Nor has Congress made an express ouster of all other subject matter jurisdiction touching upon military retirement pay, as it had done with respect to farmers who filed for bankruptcy in the Depression.

The Texas Court of Appeals based its reversal of a contempt conviction (for failure to make court-ordered payments of military retirement pay to an ex-spouse) on the ground that the McCarty decision triggered the Kalb doctrine exception to the finality of judgments rule. Ex Parte Buckhannan (Tex.App. 1981) 626 S.W.2d 65, 67, cited by Appellant. Appellee respectfully submits that the reasoning in Buckhannan is erroneous.

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C. THE PRESENT CASE IS NOT A PROPER ONE FOR CONSIDERATION OF THE QUESTION OF THE VOIDNESS OF PRIOR FINAL JUDGMENTS.

The decisions below did not involve a judgment that had become final, but one which was still on direct review. It is therefore not an appropriate case for presentation and consideration of the question of whether prior final judgments were rendered void by McCarty.

CONCLUSION

The case is not properly before this Court as an appeal, and must be viewed as a petition for writ of certiorari. The granting of review is discretionary with this Court, and depends upon the importance of the questions presented.

The decision below does not present any important question of federal law

this Court needs to settle. Whether the appellate court made a proper or improper application of stare decisis is not itself a federal question. The court below properly exercised its judicial function in deciding whether to apply the McCarty decision retrospectively to the parties before it. This Court should decline to make an across-the-board rule regarding the retrospectivity of McCarty.

The contention that the McCarty decision rendered void all previous final judgments treating military retirement pay as community property is entirely lacking in support. Moreover, the present case is not a proper one for consideration of that question.

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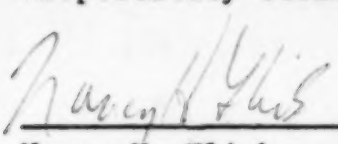
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Appellee therefore requests that this Court grant its motion to dismiss.

Respectfully submitted,



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92108

Attorney for Appellee

March 26, 1982

Appendix A	Opinion of California Court of Appeal and Modifications
Appendix B	Appellant's Petition for Hearing in California Supreme Court
Appendix C	Appellee's Answer to Petition for Hearing in California Supreme Court
Appendix D	California S.Ct.'s Minute Order Denying Appellant's Petition for Hearing

APPENDIX A

(Decision of Court of Appeal on Rehearing with Two Modifications)

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re the Marriage of LAURA LEE and RBOERT MONROE SHELDON	
LAURA LEE SHELDON, Petitioner and Respondent, v. ROBERT MONROE SHELDON, Respondent and Appellant.	4 Civ. No. 22645 (Super. Ct. No. D 136107

APPEAL from a judgment of the Superior Court of San Diego County, Carlow A. Cazares, Judge. Affirmed.

William E. Blatchley for Appellant

Nancy H. Flick for Respondent.

Robert Monroe Sheldon appeals an interlocutory judgment dissolving his thirteen year marriage.

The principal issue concerns the retroactivity of the United States Supreme Court's recent decision in McCarty v. McCarty (1981) 453 U.S. --- [101 S.Ct. 2728] and its applicability to cases not final on appeal as of the date McCarty was filed. We stress our decision is not meant to be a holding for all seasons resolving all the issues precipitated by McCarty. We only answer the narrow issue before us, concluding (1) the principles enunciated by the Supreme Court which govern the retroactivity of high court decisions mandate McCarty not be accorded full retroactivity, and (2) McCarty should not be applied to cases not final on appeal unless the military spouse requested the trial court reserve jurisdiction on the character of

the property interest in the pension or timely raised and briefed the federal preemption issue on appeal.[1]

Factual and Procedural Background

The principal assets at issue in this dissolution proceeding were the family residence and Robert's United States Navy Pension.[2] The trial court found the value of the residence to be $65,750 and the

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[1]An unarticulated, but sensitive issue permeating this case is the effect of our holding on the practicing bar. Other than indicating we have carefully considered the fallout aspect of this case and speculated on the fallout in cases which may follow, we feel it inappropriate to comment further on issues which are not before us.

[2]Robert admitted at trial, both personally and through his attorney, that his military pension rights constituted community property.

value of the pension to be $116,996. It awarded all the benefits due under the pension to Robert and the entire interest in the residence to Laura. Laura waived any difference in value of the respective properties.

Initially, on appeal, Robert challenged the actuarial valuation of his pension and the trial court's decision not to award each party a one-half interest in each of the assets. He did not contest the characterization of the pension rights as community property.

On June 8, 1981, we filed our unpublished opinion in this case, upholding the valuation of the pension and the distribution scheme. On June 26, the United States Supreme Court filed its decision in McCarty v. McCarty, supra, 453 U.S. ---, holding that federal law precludes a state from characterizing a military pension as community property in

order to divide it between the parties on dissolution of the marriage.

Robert then filed a petition for rehearing, arguing McCarty compels us to reverse the interlocutory judgment and remand for a new division of the community property and a recharacterization of Robert's pension rights as his separate property. Laura countered that the stipulation at trial coupled with Robert's express failure to contest the community nature of the pension rights on appeal rendered the McCarty holding inapplicable to the instant case.[3] We granted a

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[3]Appellant's opening brief, filed in this court on March 20, 1981, contained the following statements: "Military retirement pay constitutes community property to the extent earned during the marriage. [Citation.] [¶] Appellant herein does not contest the fact that petitioner is entitled to a portion of his retirement pay. Said fact was stipulated at trial . . . ."

The United States Supreme Court granted certiorari in McCarty on October 16, 1980. (See 449 U.S. 917.)

rehearing to address several problems inherent in the application of McCarty to California dissolution proceedings.

Retroactivity of McCarty

We must first concern ourselves with the degree of retroactivity to be accorded the McCarty decision. If McCarty is fully retroactive, Robert is entitled to receive the benefits of the decision, and the effect of the stipulation and failure to raise the issue on appeal become irrelevant.

The United States Supreme Court has had numerous occasions to review the question on propsective versus retroactive application of a judicial decision. (See, e.g., England v. Louisiana State Bd. of Med. Exam. (1964) 375 U.S. 411, 422; Linkletter v. Walker (1965) 381 U.S. 618; Stovall v. Denno (1967) 388 U.S. 293, 296-301.) Most recently, in Chevron Oil Company v. Huson (1971)

404 U.S. 97 (hereinafter Huson),[4] the Court discussed the issue at some length, identifying three factors to be considered:

(1) whether "the decision to be applied nonretroactively . . . establish[es] a new principle of law, either by overruling clear past precedent on which litigants may have relied, [citation] or by deciding an issue of first impression whose resolution was not clearly foreshadowed, [citation]";

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[4] Huson involved the retroactivity of the Court's decision in Rodrigue v. Aetna Casualty and Surety Company (1969) 395 U.S. 352, holding that a state's applicable statute of limitations, rather than the admiralty doctrine of laches, governed an action for injuries sustained while plaintiff was working on an oil drilling rig operating on the Outer Continental Shelf of Louisiana's Gulf Coast.

(2) whether the "history . . . purpose and effect" of the rule mandates restrospective [sic] operation; and

(3) whether retroactive application of the rule "'could produce substantial inequitable results . . .," injustice or hardship" . . . .' [Citation.]" (Id., at pp. 106-107.)[5]

Applying this standard to the McCarty decision, we are convinced that McCarty should not be accorded

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[5]In Stovall v. Denno, supra, 388 U.S. 293, 297, the Court set out a similar test for application to retroactivity questions involving constitutional rules of criminal procedure: "The criteria guiding resolution of the question implicates (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." The similarity of this test to the factors enunciated by the Court in Huson strongly suggests that retroactivity questions in all areas involve like considerations.

fully retroactive effect. McCarty presented an issue of first impression for the United States Supreme Court. Although the majority opinion relied on the two-year-old decision in Hisquierdo v. Hisquierdo (1979) 439 U.S. 572 for support, Hisquierdo involved an entirely different statutory scheme and clearly did not mandate the McCarty holding. (See In re Marriage of Milhan (Milhan II) (1980) 27 Cal. 3d 765, 772-777; Gorman v. Gorman (1979) 90 Cal.App. 3d 454, 460-462.) Moreover, McCarty effectively overrules consistent and well-settled California precedent holding a military pension constitutes community property, the divisibility of which on dissolution is not preempted by federal statute. (See, e.g., French v. French (1941) 17 Cal. 2d 775, 778, overruled on other grounds in In re Marriage of Brown (1976) 15 Cal. 3d 838; In re Marriage of

Fithian (1974) 10 Cal. 3d 592, cert. den. 419 U.S. 825; In re Marriage of Milhan (Milhan I) (1974) 13 Cal. 3d 129, 131; In re Marriage of Stenquist (1978) 21 Cal. 3d 779, 782. A state supreme court enjoys a position equal to that of lower federal courts where questions of federal statutory and constitutional law are involved, and is bound only by the contrary rulings of the United States Supreme Court on such issues. (See Rohr Aircraft Corp. v. County of San Diego (1959) 51 Cal. 2d 759, 764-765, revd. on other grounds (1960) 362 U.S. 628; People v. Estrada (1965) 234 Cal. App. 2d 136, 145.) Just as the Huson court concluded retroactivity was inappropriate because the court's previous decision in Rodrigue, supra, "overruled a long line of decisions by the Court of Appeals for the Fifth Circuit" (404 U.S. at p. 107), so we conclude retro-

active application of McCarty is unwarranted since the Supreme Court's decision overruled a long line of California Supreme Court cases which had definitively spoken on the issue.

Similarly, our review of the rationale underlying the McCarty decision does not convince us that retroactive application is mandated. The majority opinion notes two primary purposes of the military pension plans which community property division threatened to undermine. First, Congress has sought "to provide for the retired service member, and to meet the personnel management needs of the active military forces." (453 U.S. at p. --- [101 S.Ct. at p. 2741].) In discussing this objective of providing for the

retired service member,[6] the majority emphasizes that "the community property division of retired pay may disrupt the carefully balanced scheme Congress has devised to encourage a service member to set aside a portion of his or her retired pay as an annuity for a surviving spouse or dependent children." (Ibid.) While a purely prospective application of McCarty may have the effect of discouraging some already-divorced-but-not-yet-retired

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[6]Without discussion, the court also summarily remarked, "[s]tate courts are not free to reduce the amounts that Congress has determined are necessary for the retired member." (453 U.S. at p. --- [101 S.Ct. at p. 2741].) It is difficult to accept and apply the proposition that the amount of a retiree's pension is in any sense based on a Congressional determination of his "need." Pension amounts are calculated on a percentage of active duty pay, which is in turn dependent on the service member's rank and grade. These amounts have little or no relationship to need, being compensation for past services rendered. In all probability, Congress intended both active duty pay and military pensions as compensation entitlements. (Cf. Estate of Worley (1948) 87 Cal. App. 2d 760, 764-765.)

service members from electing to fund an annuity, the number of factors which must affect such a decision make the potential effect speculative at best.[7] Commenting on the second obejetive, the court said that "the military retirement system is designed to serve as an inducement for enlistment and reenlistment, to create an orderly career path, and to ensure 'youthful and vigorous' military forces." (Id., at p. ____ [101 S.Ct. at p. 2742], fn. omitted.) Potential division of the military pension, allegedly diminishes "'[o]ne of the inducements selected, [citation] to make . . . military service attractive" as well as "discourag[ing]

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[7]Even a purely prospective reading of McCarty will apply to all service members not yet divorced. Those members already divorced who have already retired are ineligible to elect to fund an annuity (see 10 U.S.C. §§ 1431(b) and 1448(a)); thus, any Congressionally-ordained incentive will have no effect as to them.

retirement by reducing the retired pay available to the service member, . . ." (Ibid.) It is clear that the concept of an inducement operates prospectively as to potential enlistees and reenlistees. A non-retroactive application of McCarty would do no harm to this asserted federal interest. As to the discouraging retirement rationale, the argument assumes the service member is not yet retired. Many members subject to pre-McCarty divorce decrees, however, have already retired and the pension incentive is inapplicable to them. Moreover, even as to those divorced members who have not yet retired, community property division of pension rights discourages retirement only to the extent the pension was actually divided in kind; if the non-service member spouse received an off-setting award of other community property in exchange for the pension rights, as in the present case, a

failure to apply McCarty retroactively will not discourage retirement of that service member. We thus conclude that the harm to federal interests which would be occasioned by a purely prospective application of McCarty is minimal. Rather, the Congressional purposes articulated by the McCarty majority can be adequately served even if the decision is not given retroactive effect.

While review of the first two factors identified in Huson's discussion of retroactivity does not indicate McCarty should be accorded retroactive effect, examination of the third factor -- the potential for injustice and hardship -- convinces us the Court's decision should not be applied to judgments which were final before McCarty was filed. In perhaps no other area of law is the need for stability and finality greater than marriage and family law. Without guessing

as to how our society may structure future social relationships (cf. Marvin v. Marvin (1976) 18 Cal. 3d 660), at this stage of our societal development, marital dissolution is almost by definition a mentally, emotionally, and often physically disruptive experience for the parties involved. Divorce inevitably requires old plans be abandoned, new plans made, and perceptions altered to conform to a changed reality. To permit and in fact encourage the relitigation of property interests long after the issues were supposedly settled would merely serve to re-open old wounds and create new ones. There is no guarantee that the non-service member spouse would have assets sufficient to reimburse the service member for that portion of the pension rights which had previously been an awarded share of community property. Substantial hardship would result in

cases where the non-member relied on the property settlement in converting his or her share into non-liquid assets. Moreover, a reallocation of property interests would likely constitute sufficient "changed circumstances" to trigger a second round of relitigation involving spousal support awards. (See generally, In re Marriage of Kuppinger (1975) 48 Cal. App. 3d 628, 633; Verner v. Verner (1978) 77 Cal.App. 3d 718, 727; but cf. In re Marriage of Cobb (1977) 68 Cal.App. 3d 855, 860-861.) We also note the immense burden on the administration of justice in our civil courts were such relitigation permitted.[8] Under these circumstances, we conclude that a fully retroactive application of McCarty would be inimical to the

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[8]As we noted previously (fn. 4, ante), the United States Supreme Court has indicated that recognition of this burden is an appropriate consideration in determining the degree of retrospectivity to be accorded a court decision.

principles of equity and fairness which underlie this state's family law system. Finding nothing in the nature or rationale of the McCarty decision which mandates a retroactive effect, we hold McCarty is inapplicable when the property rights in the military pension have been determined by a dissolution judgment which became final before the filing of the United States Supreme Court's opinion. (See In re Marriage of Brown, supra, 15 Cal. 3d 838, 851 and fn. 13.)

Application of McCarty to Cases Not Final on Appeal

Having concluded McCarty is not fully retroactive, we must now concern ourselves with Robert's contention that the principle of limited retroactivity should be invoked to apply the McCarty holding to all cases not final on appeal. (See In re Marriage of Brown, supra, 15 Cal. 3d at p. 851). In doing so, we

are not unaware that the facts of this case present only the tip of an iceberg-like issue which will have ramifications for litigants, attorneys, and the legal system in general. (See generally, 1981 Cal. Family L.Rep. 1650, 1658-1662.) As part of the adjudicative system, this court should not anticipate and resolve the possible issues that may yet arise in the myriad of cases at various stages of the legal process which may be affected by the McCarty decision. We are also cognizant of pending legislation in both houses of Congress aimed at negating the impact of McCarty. (See 453 U.S. at p. ---, fn. 25 [101 S.Ct. at p. 2740].) Accordingly, we limit our discussion in this case to cases in which an appeal was filed before the McCarty decision, and do not consider issues such as the resolution of post trial motions addressed to the trial court which may involve

different equitable considerations. (See e.g., Civ. Code, §§662 and 663).

We have no quarrel with applying McCarty to cases not final on appeal where the federal preemption issue was argued by the service member-spouse in the trial court and where the issue was raised on appeal.[9] That is not the case here. As we noted previously (fn. 1, ante), Robert stipulated to the community nature of the pension rights in the trial court and expressly re-affirmed that stipulation on appeal, some five months after the United States Supreme Court granted certiorari in McCarty. (See fn. 2, ante.)

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[9]We thus anticipate that the service member-spouse in Milhan v. Milhan (1981) --- U.S. --- [101 S.Ct. 3152], in which the United States Supreme Court granted certiorari and remanded to the California Supreme Court for reconsideration in light of McCarty, will be accorded the benefits of the new rule since the federal preemption issue was raised on appeal. (See In re Marriage of Milhan (Milhan II), supra, 27 Cal. 3d 765.)

We begin our analysis with the well-settled proposition that an appellate court may consider as waived any issues not raised in the appellant's opening brief. (E.g., Title G. & T. Co. v. Fraternal Finance Co. (1934) 220 Cal. 362, 363; People ex rel. D. of P. Wks. v. McCullough (1950) 100 Cal. App. 2d 101, 106; Universal Ins. Co. v. Manhattan M. Line (1947) 82 Cal.App. 2d 425, 428.) An equally important corollary to this rule states that a petition for re-hearing is an inappropriate occasion to raise arguments not pursued in the original appeal. (E.g., People ex rel. Dept. of Public Works v. Mascotti (1962) 206 Cal.App. 2d 772, 779-780; Sanders v. Howard Park Co. (1948) 86 Cal.App. 2d 721, 723; Merchants' Ice etc. Co. v. Globe Brew. Co. (1946) 73 Cal.App. 2d 828, 838.) Robert contends, however, these rules should not

be applied in situations where a definitive higher court opinion declaring a new rule of law is announced after the appellant has filed his opening brief but before the expiration of the appellate court's jurisdiction.

The issue thus presented is not one which has frequently appeared in reported California decisions. Consideration of arguments not timely raised has generally been thought to lie within the discretion of the appellate court. Such discretion appears to have been exercised in Rayner v. Ramirez (1958) 159 Cal.App. 2d 372, when as issue raised by letter after the filing of briefs was based on a just-filed Supreme Court case which overruled well-settled precedent. The Rayner court concluded, "Under the circumstances there appears to be good reason for the failure of plaintiffs to raise the point in their opening brief." (Id., at p. 375.)

On the facts of the instant case, we are unable to reach a similar conclusion. Our view is based on several separate considerations.

First, the Supreme Court's decision to grant certiorari in McCarty preceded the filing of Robert's opening brief by five months. (See 449 U.S. 917.) His brief, however, expressly reaffirmed his previous stipulation to the community nature of his pension rights. Since the original stipulation was entered into before the grant of certiorari, it may be that such action was excusable. After the grant of certiorari, however, Robert should have argued on appeal or in a separate motion to the trial court that continued enforcement of the stipulation would be unjust in light of the United States Supreme Court's action. Having failed to pursue either of these alternatives, it is not unfair that

Robert continue to be bound by his original agreement.

Second, the unique nature of the marital institution and the community property concept suggests that the finding of a community interest in the pension rights not be disturbed at this point in the litigation.[10] As we

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[10]Community property is a concept of considerable fluidity and flexibility, recognizing the unique nature of each marital combination. It thus differs considerably from other legal characterizations of property interests. Separate property of the spouses is readily convertible to community property and vice versa. (See 7 Witkin, Summary of Cal. Law (8th ed. 1974) Community Property, §71, p. 5159.) No particular formalities are required for such a conversion, which may be accompanied by simple oral agreement. (Beam v. Bank of America (1971) 6 Cal. 3d 12, 25; Haseltine v. Haseltine (1962) 203 Cal.App. 2d 48, 58.) No consideration independent of the consent of the parties is needed. (Civ. Code, §4802; Estate of Wilson (1976) 64 Cal.App. 3d 786, 798.)

The same factors which argue in favor of a flexible community property concept also make it difficult to evaluate Robert's failure to contest the community nature of his military pension rights. Litigants often stipulate to conclusions or fail to

noted earlier (p. 10, ante), finality in dissolution proceedings is extremely important from the standpoint of the human beings involved. In situations where a partition judgment is severable, this finality principle indicates that appeal of one portion of the judgment does not necessarily stay operation of other parts. (Cf. Harrold v. Harrold (1954) 43 Cal. 2d 77; In re Marriage of Steinberg (1977) 66 Cal.App. 3d 815, 820-821.) If mere pendency of appellate jurisdiction permitted the raising of the

---

pursue technically meritorious legal arguments due to personal values and attitudes toward equity or responsibility. This is particularly true in dissolution proceedings where the parties may have many reasons to attempt to limit the animosity engendered by the litigation process. We thus may only evaluate the validity of a stipulation or decision not to contest based on what the party should have known regarding the state of the law.

pension rights issue, previously unstayed portions of the judgment might well be affected. The interests of the parties or society are not served by the disruption of plans and expectations which could result. In addition, it seems anomolous to allow the rights of litigants to turn on the fortuity that an appeal on an unrelated issue was filed, thus preventing the judgment from becoming final. Here, for example, Robert's original grounds for appeal concerned an alleged abuse of discretion by the trial court. We had little trouble in disposing of this contention in our first opinion. (See pp. 18-19, post.) Had Robert accepted the trial court's conclusion, as well he might have, the judgment would long since have become final. The result would be even more anomolous had Laura filed a meritorious appeal which was followed by Robert's petition for

rehearing raising the McCarty issue.

Finally, we note that additional support for our conclusion is provided by the recent decision of the Second District Court of Appeal in In re Marriage of Mahone (1981) --- Cal.App. 3d --- [176 Cal.Rptr. 274].[11] On facts virtually identical to those of the instant case, the Mahone court indicated,

> "The stipulation was in accordance with the law as it then stood, and Husband is not entitled to relief from the stipulation merely because the law was subsequently changed by judicial decision. [Citations.]" (Id., at p. --- [176 Cal.Rptr. at p. 276].)

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[11] We note that a petition for hearing, filed October 5, 1981, is pending before the California Supreme Court. Nevertheless, Mahone and the instant case will hopefully provide some consistent guidance for the family law bar of the state.

Accordingly, we conclude that the holding in McCarty is inapplicable to cases where a service member-spouse stipulates to the community nature of his or her pension rights at trial, and does not timely contest such characterization on appeal.

Alleged Abuse of Discretion by the Trial Court

Robert's additional contentions do not require extensive discussion. He first claims the court abused its discretion in awarding all of his retirement benefits to him and the entire community interest in the family residence to his wife instead of equally dividing those assets in kind.

At trial, William F. Marples, a consulting actuary, testified the community interest in Robert's naval pension was $116,996. In reaching his conclusion he used an interest rate of 6% and an

increase in cost of living of 5%. Robert says the use of these factors amounts to speculation and accordingly the valuation reached was wrong. Admittedly, all actuarial determinations involve some uncertainty. Nevertheless, a trial court has the ability to determine the credibility of an expert's opinion including the reasonableness of underlying factors used in forming that opinion. The court's acceptance of Marple's testimony was within its discretion. (See In re Marriage of Skaden (1977) 19 Cal. 3d 679, 688-689.)

As noted previously, the court awarded Robert all the benefits due under his naval pension ($116,996), and awarded Laura the entire interest in the family residence ($65,750 net). A court is not required to divide community property equally in kind. (In re Marriage of Connolly (1979) 23 Cal. 3d 590, 603.)

> "[T]he asset distribution method of dividing community property is a permissible means of complying with the mandate of [Civil Code] section 4800. [Citations.]" (In re Marriage of Fink (1979) 25 Cal. 3d 877, 886.)

In light of the circumstances of the parties and the effect of uprooting children, ages 12 and 8, the court was well within its discretion in awarding her the house, particularly here, where Laura was willing to pay a premium for that division.

Robert also says the court abused its discretion in awarding $50 monthly as spousal support. On a record which reflects Laura's take home pay of about $125 weekly, while Robert had a net monthly income of around $1,035, the court acted within its discretion. (See In re Marriage of Morrison (1978) 20 Cal. 3d 437.)

Disposition

Judgment affirmed.

CERTIFIED FOR PUBLICATION.

WIENER, J.

WE CONCUR:

BROWN, P.J.

WORK, J.

COURT OF APPEAL-STATE OF CALIFORNIA

FOURTH APPELATE DISTRICT

DIVISION ONE

In re the Marriage of LAURA LEE and ROBERT MONROE SHELDON	
LAURA LEE SHELDON, Petitioner and Respondent,	
v.	4 Civ. No. 22645
ROBERT MONROE SHELDON, Respondent and Appellant.	(Super. Ct. No. D 136107)

THE COURT:

Modification of Opinion

1) The Civil Code cite on the last line of the first paragraph on page 12 should be Code of Civil Procedure, sections 662 and 663.

2) In the 9th line of Footnote 10 on page 15, the word "accompanied" should read "accomplished."

Acting Presiding Justice

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Nancy H. Flick, Esq.

COURT OF APPEAL-STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

In re Marriage of Sheldon LAURA LEE SHELDON	)	
Respondent,	)	4 Civ. No. 22645
v.	)	SUPERIOR COURT NO. D 136107
ROBERT MONROE SHELDON, Appellant.	)	

Second Modification of Opinion

BY THE COURT:

1) The second paragraph of footnote 3 on page 4 is modified to read as follows: "On October 16, 1980, the U.S. Supreme Court announced it had postponed consideration of jurisdiction in McCarty pending a full hearing of the case on the merits. (See 449 U.S. 917.)"

2) The first two lines on page 9 should read: "military pension, allegedly diminishes 'one of the inducements selected to make military service'". . .

3) The sixth line on page 13 should read: "months after the United States Supreme Court announced a hearing" . . .

4) The first line of the last paragraph on page 14 should read:

"First, the Supreme Court's decision to hear" . . .

5) The third and fourth lines on page 15 should read: "into before the hearing was announced, it may be that such action was excusable. After the October 16 announcement, however, Robert" . . .

Presiding Justice

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APPENDIX B

CIVIL NO. _____

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

In re the marriage of	)	
	)	
LAURA LEE SHELDON,	)	
	)	
Plaintiff and	)	
Respondent,	)	CIVIL NO. _____
	)	
v.	)	
	)	
ROBERT MONROE SHELDON,	)	
	)	
Defendant and	)	
Appellant.	)	
	)	

PETITION FOR HEARING

On Appeal from the Judgment of the
Superior Court of the State of California
San Diego County

Honorable CARLOS A. CAZARES, Judge

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IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

In re the marriage of	)	
	)	
LAURA LEE SHELDON,	)	
	)	
Plaintiff and	)	
Respondent.	)	CIVIL NO. _____
	)	
v.	)	
	)	
ROBERT MONROE SHELDON,	)	
	)	
Defendant and	)	
Appellant.	)	
_____	)	

PETITION FOR HEARING

On Appeal from the Judgment of the
Superior Court of the State of California
San Diego County

Honorable Carlos A. Cazares, Judge

To the Honorable Rose Bird, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the State of California:

Appellant hereby petitions for a hearing to consider the decision of the Court of Appeal of the State of California, Fourth Appellate District, Division One, filed in this action on June 8, 1981, affirming the judgment of the trial court in favor of Respondent. A copy of the decision of the court of appeal showing the date of its filing is set forth herein as Appendix "A".

Hearing by this Court is necessary on the ground that the decision of the Court of Appeal is not in line with the authorities cited herein and this Court's ruling is necessary to secure uniformity of decision and important questions of law are at issue herein requiring settlement by this Court, to wit: whether the Court of Appeal acted in excess of its jurisdiction.

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STATEMENT OF THE CASE

On February 9, 1979, Petitioner LAURA LEE SHELDON, filed a Petition for Dissolution of Marriage to Respondent, ROBERT MONROE SHELDON (CT 1-2). At the same time the Petition was filed, the Petitioner also filed a financial declaration (CT 3-6).

On February 26, 1979, Respondent filed his response to the Petition for Dissolution.

On June 22, 1979, Petitioner filed a second financial declaration (CT 9-12). On the same date, Respondent filed a financial declaration (CT 13-16).

The trial of the matter was held on June 22, 1979, without a jury, the Honorable Carlos A. Cazares presiding. The Court awarded child support in the amount of $150.00 per child per month (RT 57, lines 9-10), and retained jurisdiction over spousal support (RT 57,

lines 10-12). The matters of the division of the community residence and pension were taken under submission (RT 57, lines 13-14).

On July 25, 1979, the Honorable Carlos A. Cazares submitted his findings and entered judgment (CT 17) as to the community property as follows: Petitioner's community interest in the pension fund is approximately $58,498.00 (CT 18). Respondent's community interest in the family residence is approximately $32,875.00 (CT 18). Petitioner was awarded the family residence as her sole and separate property (CT 18) and Respondent was awarded the Navy Pension benefits as his sole and separate property (CT 18).

The stipulation and waiver of the parties was filed with the Court on February 6, 1980 (CT 20-23).

The Interlocutory Judgment of Dissolution of Marriage was filed on February 13, 1980 (CT 24-26).

On February 14, 1980, the Notice of Entry of Judgment was filed (CT 27).

Notice of Appeal from the judgment taken was filed by Respondent on April 7, 1980 (CT 28).

Attorney for Appellant mistakenly stated in his opening brief to the Fourth Appellate District Court of Appeal that Respondent's alleged entitlement to a portion of Appellant's military retirement pay had been stipulated at trial (Appellant's Opening Brief, p. 6). In fact, no such stipulation had occurred.

On June 8, 1981, the Court of Appeal upheld the order of the trial court.

On June 26, 1981, the United States Supreme Court filed its decision in McCarty v. McCarty, ____U.S.____, 101 S.Ct. 2728, 69 L.Ed. 2d 589, holding that state community property laws had been pre-empted under the Supremacy Clause of the United States Constitution insofar

as they purported to characterize military retired pay as community property.

Appellant then timely filed a Petition for Rehearing in the Court of Appeal in light of McCarty. Rehearing was granted, but the Court of Appeal again upheld the order of the trial court in its treatment of Appellant's retirement pay as community property. Sheldon v. Sheldon (1981) 4 Civ. No. 22645, 81 Daily Journal D.A.R. 2972.

CONTENTIONS ON APPEAL

Appellant's military retired pay cannot be treated as community property upon divorce due to the pre-emption of California state law by federal legislation.

ARGUMENT

I

THE DECISION OF THE COURT OF APPEAL SHOULD BE REVERSED BECAUSE THE UNITED STATES CONGRESS HAS PRE-EMPTED ALL STATE LAWS THAT TREAT MILITARY RETIRED PAY AS COMMUNITY PROPERTY.

Federal pre-emption of State statutes

is ultimately a question under the Supremacy Clause of the Federal Constitution. U.S. Const. Art. VI, cl. 2; 16 American Jurisprudence 2d Constitutional Law §291, p. 795. In McCarty v. McCarty, ____U.S.____, 101 S.Ct. 2728, 69 L.Ed. 2d 589 (1981), the United States Supreme Court reversed the First Appellate District California Court of Appeal which had upheld a trial court's award of an interest in a military pension to the serviceman's wife upon their divorce. The high court ruled that the application of State community property law to military pensions "conflicts with the express terms of the federal law and . . . sufficiently injure[s] the objectives of the federal program to require nonrecognition." 101 S.Ct., at 2735. Thus, a finding of pre-emption was justified. Ibid. More recently, the Court has reaffirmed the McCarty principle in Ridgway v. Ridgway,

42 CCH S.Ct. Bull. B241 (November 10, 1981). In Ridgway, the Court ruled that an insured serviceman's beneficiary designation under a life policy issued pursuant to the Servicemen's Group Life Insurance Act of 1965 (SGLIA), Pub.L. 89-214, 79 Stat. 880, prevails over a constructive trust imposed upon the policy by a state court decree at the behest of the serviceman's ex-wife. In reversing the judgment of the Supreme Judicial Court of Maine, the Court stated as follows:

> Notwithstanding the limited application of federal law in the field of domestic relations generally, see McCarty v. McCarty, ___ U.S. ___, ___ (1981) (slip op. 9-10; Hisquierdo v. Hisquierdo, 439 U.S. 572, 581 (1979); In re Burris, 136 U.S. 586, 593-594 (1890), this Court, even in that area has not hesitated to protect, under the Supremacy Clause, rights and expectancies established by federal rights. See McCarty v. McCarty, supra; Hisquierdo v. Hisquierdo, supra; Free v. Bland, 369 U.S. 663 (1962); Wissner v. Wissner, 338 U.S. 655 (1950); McCune v. Essig, 199 U.S. 382 (1905). Cf. Yiatchos v. Yiatchos,

376 U.S. 306, 309 (1964). While "[s]tate family and family-property law must do 'major damage' to 'clear and substantial' federal interests before the Supremacy Clause will demand that state law be overridden," Hisquierdo, 439 U.S., at 581, with references to United States v. Yazell, 382 U.S. 341, 352 (1966), "[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail." Free v. Bland, 369 U.S., at 666. See also Gibbons v. Ogden, 9 Wheat. 1, 210-211 (1824). And specifically, a state divorce decree, like other law governing the economic aspects of domestic relations, must give way to clearly conflicting federal enactments. McCarty v. McCarty, supra; Hisquierdo v. Hisquierdo, supra. That principle is but the necessary consequence of the Supremacy Clause of our national Constitution. Ridgway, supra, at B247-248.

Therefore, according to Ridgway, Congressional enactments, like the military retired pay statutes, "prevail over and displace inconsistent state law (emphasis supplied)." Ridgway, supra at B253. In Ex Parte Buckhannan, No. 04-81-00243-CV, Court of Appeals, Fourth Supreme Judicial

District of Texas (October 15, 1981), Justice Clark, speaking for the Court, explained as follows:

> In determining how McCarty affects the judgment under collateral attack before us [via application for writ of habeas corpus re contempt for failure to obey divorce decree order of payment of part of military pension to former spouse], it is essential to focus upon what the [Supreme] Court said, reduced to the plainest terms; i.e., that Congress to protect 'clear and substantial federal interests,' pre-empted state community property laws with respect to military retired pay prior to 1977 by enacting the military retirement statutes in question. By definition, pre-emption by specific Congressional enactment took place when Congress acted, in accordance with the statutory scheme. The Court, in its opinion of June 26, 1981, pre-empted nothing; it only considered, determined, and announced what Congress had already done. (emphasis supplied). Buckhannan, supra at pp. 5-6.

In the case at bar, the interlocutory judgment of dissolution was filed on February 13, 1980 (CT 24-26). In Paragraph 5 on page 2 of said judgment,

an interest in Appellant's Navy pension is purportedly adjudged in and awarded to Respondent Laura Lee Sheldon (CT 25). Yet McCarty determined that Congress had pre-empted the application of state community property laws prior to 1977. The judgment cannot stand. Congress had affirmatively deprived state courts of the power to enter such judgments long before the instant case ever came to trial.

The opinion in the Fourth District Court of Appeal below most unfortunately failed to address the all-important effect of pre-emption. Instead, the Court mistakenly concluded that the McCarty decision lacked "fully retroactive effect." Sheldon v. Sheldon (1981) 4 Civ. No. D136107, 81 Daily Journal D.A.R. 2972. The Fourth District Court cited the United States Supreme Court's limitation of the retroactive effect of Rodrigue v. Aetna Casualty and Surety Company (1969) 395 U.S. 352,

as announced in Chevron Oil Company v. Huson (1971) 404 U.S. 97 (hereafter Huson), re-examined the reasoning of the McCarty opinion in light of certain principles developed in Huson, and held that,

> McCarty is inapplicable when the property rights in the military pension have been determined by a dissolution judgment which became final before the filing of the United States Supreme Court's opinion. Sheldon, supra, p. 11, 81 Daily Journal D.A.R. at 2973.

However, neither Huson or Rodrigue had anything to do with Congressional pre-emption of state law. The Court in Rodrigue had merely decided which of two federal statutes - the Death on the High Seas Act, 41 Stat. 537, 46 U.S.C. §761, et seq. (hereafter "Seas Act") and the Outer Continental Shelf Lands Act, 67 Stat. 462, 43 U.S.C. §1331 et seq. (hereafter "Lands Act") - would govern a death or injury on an offshore oil-drilling rig for the purposes of limitations

periods. Because the Court in Rodrigue chose the Lands Act, which, by federal law, incorporated adjacent state statutes of limitation, whereas earlier Fifth Circuit decisions had applied the admiralty doctrine of laches through the Seas Act, a limited retroactive application of Rodrigue was deemed warranted in Huson. The Supreme Court simply chose one of two federal laws in Rodrigue; pre-emption played no role in either Rodrigue or Huson. It was, therefore, never mentioned.

Similarly, "retroactivity" was never mentioned in McCarty; nor was it discussed in the Court's most recent pronouncement in Ridgway. "Retroactivity" is wholly irrelevant when the Supreme Court rules that state laws have been pre-empted by federal statutes, for such Congressional enactments take effect when they are passed into law and signed by the President. If one accepts the reasoning of the Fourth

District Court below, then Congressional enactments, lawfully adopted, are held in abeyance, having no legal effect until the Supreme Court is given an opportunity to rule upon them. This reasoning makes the Supreme Court a "super-legislature" and destroys the very foundation of a government composed of three separate but co-equal branches. The Supreme Court would displace the President of the United States in his right and duty to sign legislation into law; such legislation would only "take effect" when the Supreme Court so ruled. Limited retroactive application of judicial decisions has its place and purpose in American jurisprudence; the temporary suspension of the pre-emptive effectiveness of valid federal legislation is neither, for the Supreme Court is powerless, under our system of government, to do so. Pre-emption cannot be avoided or delayed by any judicial calendar.

II

FEDERAL PRE-EMPTION OF STATE COMMUNITY PROPERTY LAWS RENDERS STATE JUDGMENTS VOID INSOFAR AS THEY PURPORT TO AWARD THE NON-SERVICE MEMBER SPOUSE AN INTEREST IN SAID MEMBER'S MILITARY RETIREMENT PAY.

A.

THE McCARTY APPEAL, AND THE SUPREME COURT'S DECISION THEREON, WAS BASED UPON THE APPELLANT HAVING CALLED INTO QUESTION THE VALIDITY OF THE CALIFORNIA STATUTE UNDER WHICH THE MILITARY PENSION WAS DIVIDED.

In McCarty, the Supreme Court explained how the appeal was properly at bar:

> Appellee contends that this is not a proper appeal because appellant did not call the constitutionality of any statute into question in the California courts. Our review of the record, however, leads us to conclude otherwise. McCarty, supra, 101 S.Ct., at 2734, fn. 12.

The Court noted appellant's contention in the state court that the Supremacy Clause "pre-empts all state community property laws" as applied to federal military retired pay, ibid, and that "California

courts are accordingly precluded by the Supremacy Clause from dividing such benefits." Ibid. Therefore, on the authority of Dahnke-Walker Milling Co. v. Bondurant (1921) 257 U.S. 282, the Court concluded that Colonel McCarty had brought a proper appeal. Ibid. In Dahnke-Walker, the Court noted that the appellant therein

> . . . did not simply claim a right or immunity under the Constitution of the United States, but directly insisted that as to the transaction in question the . . . statute was void, and therefore unenforceable, because in conflict with the commerce clause (emphasis added) . . . Id. at 288-289 (cited in McCarty, supra, 101 S.Ct., at 2734, fn. 12).

The question answered in McCarty was, therefore, whether California Civil Code Section 4800(a) was void, insofar as it purported to divide a military pension, because in conflict with federal military retirement statutes and pre-empted through the Supremacy Clause. The Court in Dahnke-Walker explained further:

> That the statute was not claimed to be invalid in toto and for every purpose does not matter. A statute may be invalid as applied to one state of facts, and yet valid as applied to another. (citations omitted.) Besides, a litigant can be heard to question a statute's validity only when and so far as it is being or is about to be applied to his disadvantage. (emphasis added.) (citations omitted.)
>
> . . .
>
> Our conclusion on the jurisdictional question is that, as the state court applied and enforced to the plaintiff's disadvantage a state statute which the plaintiff seasonably insisted as so applied and enforced was repugnant to the Constitution and void, the case is rightly here on writ of error (emphasis added). Id. at 289-290.

McCarty's reversal of the California Court of Appeal sustains the conclusion that Civil Code Section 4800(a) is void insofar as judgments based upon it purport to divide military pensions. The Texas Court of Appeals in Buckhannan concurred:

> Respondent argues that the judgment under attack in the case before us is at worst erroneous, and not void, and that the relief sought by relator is thus barred

by the doctrine of res judicata. We cannot agree. The court pointed out in McCarty that when Congress enacted the military retirement system, it acted pursuant to its express constitutional power over the armed forces; and the court observed further that 'in no area has the court accorded Congress greater deference than in the conduct and control of military affairs.' ___ U.S. at ___, 101 S.Ct. at 2743, 69 L.Ed. 2d at 608. When Congress has exercised its plenary power to deprive State courts of jurisdiction over a particular subject, judgments of State courts purporting to exercise jurisdiction over the preempted subject are 'nullities and vulnerable collaterally.' Kalb v. Feuerstein, 308 U.S. 433, 439 (1940).[4]

Footnote 4. The Kalb doctrine remains one of the few exceptions to the general rule that final judgments are not subject to collateral attack, even on grounds of lack of jurisdiction. The doctrine is rooted in the principle that collateral attacks on subject matter jurisdiction in preemption cases may serve an important policy extrinsic to the judicial system. The continuing vitality of the Kalb doctrine is reflected by its codification in the Restatement (Second) of Judgments. See Moore, Collateral Attacks on Subject Matter Jurisdiction: A Critique of the

Restatement (Second) of Judgments, 66 CORNELL L. REV. 534 (1981). Buckhannan, supra at 7.

The doctrine that collateral attack to challenge the jurisdiction of a state court will be allowed on the grounds that the policy underlying res judicata (that there should be an end to litigation) was outweighed by a strong federal policy that would be obstructed if the court were allowed to act in excess of jurisdiction, was explained in Kalb as follows:

> The states cannot, in the exercise of control over local laws and practice, vest State courts with power to violate the supreme law of the land. Id. at 439.

Kalb also repeated the principle that

> . . . a State court before which a proceeding is competently initiated may - by operation of supreme Federal law - lose jurisdiction to proceed to a judgment unassailable on collateral attack . . . Id. at 440, fn. 12;

and that

> . . . considerations as to whether the issue of jurisdiction was actually contested in the (State) Court, or whether it could have been contested, are not applicable where the plenary power of Congress . . . has been exercised as in this Act. Id. at 444.

Similarly, in United States v. United States Fidelity & Guar. Co. (1940) 309 U.S. 506, the Court permitted collateral attack of a judgment on a cross-claim against the United States, on the ground that since the United States had not waived its sovereign immunity, the court entering the judgment had no jurisdiction. The doctrine of sovereign immunity was held to outweigh the policy underlying res judicata. If such immunity could be waived "it would subject the Government to suit in any court in the discretion of its responsible officers. This is not permissible." Id. at 513.

In McCarty, the United States Supreme

Court emphasized the plenary power of Congress over military affairs. The Court explained, at 101 S.Ct., 2741, as follows:

> Under the Constitution, Congress has the power "(t)o raise and support Armies." "(t)o provide and maintain a Navy," and "(t)o make Rules for the Government and Regulation of the land and naval Forces." U.S. Const., Art. I, Section 8, cls. 12, 13, and 14. See generally Rostker v. Goldberg, ___U.S. ___, ___ (1981) (slip op. 5). Pursuant to this grant of authority, Congress has enacted a military retirement system designed to accomplish two major goals: to provide for the retired service member, and to meet the personnel management needs of the active military forces. The community property division of retired pay has the potential to frustrate each of these objectives.

And at page 2743 of 101 S.Ct.:

> We have very recently reemphasized that in no area has the Court accorded Congress greater deference than in the conduct and control of military affairs. See Rostker v. Goldberg, ___U.S. ___, at ___ (slip

> op. 5). Thus the conclusion that we reached in Hisquierdo (439 U.S. 572 (1979)) follows a fortiori here: Congress has weighed the matter and "(i)t is not the province of state courts to strike a balance different from the one Congress has struck." 439 U.S., at 590 (emphasis added).

Pre-emption, therefore, displaced asserted State court jurisdiction over military pensions and rendered judgments void insofar as they awarded a community interest therein to the non-servicemember spouse.

B.

BECAUSE CIVIL CODE SECTION 4800(a) IS VOID INSOFAR AS IT PURPORTS TO CHARACTERIZE MILITARY PENSIONS AS COMMUNITY PROPERTY, THE TRIAL COURT HERE-IN LACKED JURISDICTION TO AWARD AN INTEREST IN APPELLANT'S MILITARY PENSION TO RESPONDENT, RENDERING THAT PART OF THE DIVORCE DECREE VOID AND SUBJECT TO COLLATERAL ATTACK.

Civil Code Section 4800(a) confers subject matter jurisdiction upon California courts over community property in dissolution proceedings. McCarty held that this

statute was void, insofar as it purported to divide a military pension, because repugnant to the federal Constitution. The applicable rule in California, as stated in Mendoza v. Small Claims Court (1958) 49 Cal. 2d 668 at 670, is as follows:

> If a statute on which a court's jurisdiction in a proceeding depends is unconstitutional, the court has no jurisdiction in the proceeding (citations omitted).

Consequently, the judgment of a court lacking jurisdiction of the subject matter is void. David v. Myre (1964) 228 Cal. App. 2d 616, 618-619. Moreover, it is stated that

> (a) judgment absolutely void upon its face may be attacked anywhere, directly or collaterally, whenever it presents itself, either by parties or strangers. It is simply a nullity, and can be neither the basis nor evidence of any right whatever. Forbes v. Hyde (1866) 31 Cal. 342 at 347.

And where a court is wholly lacking in jurisdiction of the subject matter of

an action, "jurisdiction may not be conferred by consent, waiver, agreement, acquiescence or estoppel. (citations omitted)." Schlyen v. Schlyen (1954) 43 Cal. 2d 361 at 375. Therefore, jurisdiction over the military pension for the purposes of community division could not have been conferred by stipulation of the parties: "subject matter jurisdiction cannot be conferred by counsel approving an ultra vires order." In Re Blaze (1969) 271 Cal. App. 2d 210 at 217. Blaze, like the Texas court in Buckhannan, supra, overturned a contempt citation on writ of habeas corpus, because the trial court had lacked subject matter jurisdiction ab initio. Throughout the Fourth District's opinion herein, much is made of Appellant's "failure" to raise the issue of pre-emption in his opening brief. However, in Davis v. Myre, supra, the Court ruled as follows:

> The fact the question of jurisdiction was not raised at the trial or in the opening brief is not material as "it is the universal rule that jurisdiction of the subject matter cannot be conferred upon a tribunal by consent, and it follows that the parties cannot make an effective waiver of a lack of such jurisdiction.: (citation omitted). Id. at 618 (emphasis supplied).

Notwithstanding the above, a review of the record of trial in the case at bar does not reveal any "stipulation" to the community characterization of Appellant's military pension. At page 23 of the Reporter's Transcript, Appellant's attorney, Mr. Blatchley, merely stated that Appellant was "prepared to stipulate that the petitioner [Respondent on appeal] does have a community interest in [Appellant's] military retirement." (emphasis supplied). This statement cannot be characterized as anything more than an unaccepted offer to stipulate. Indeed, the trial judge himself never deemed the military pension

issue as stipulated. The court's findings, in pertinent part, read as follows:

> The parties entered into various stipulations including custody and rights of visitation of the minor children and distribution of certain community assets, leaving for the Court to determine disposition of the following issues:
>
> 1. Child support
> 2. Spousal support
> 3. Navy pension
> 4. Family residence.
>
> (CT 17, emphasis supplied).

The aforesaid offer to stipulate was, at best, made contingent upon the trial court's ordering an equal division of the monthly retirement checks, not an offsetting award of the family residence to Respondent (RT 50-55). Moreover, having timely appealed the judgment of the trial court awarding such offset, Appellant has preserved appellate jurisdiction over the issue of his retirement pay, notwithstanding the remedies available to him by collateral attack.

Although Appellant originally argued on appeal that the offsetting award was calculatively erroneous, said offset is wrong for another reason as well. McCarty reiterated that military pay could not be attached so long as it was in the Government's hands. McCarty, supra, 101 S.Ct., at 2739, citing Buchanan v. Alexander, 4 How. 20, 11 L.Ed. 857 (1846), and Applegate v. Applegate, 39 F.Supp. 887 (E.D. Va. 1941). The Court then concluded that

> [I]t is clear that the injunction against attachment is not to be circumvented by the simple expedient of an offsetting award. See Hisquierdo, 439 U.S., at 588, 99 S.Ct., at 811. McCarty, supra, 101 S.Ct., at 2739 fn. 22.

In Hisquierdo, 439 U.S. 572 (1979), the Supreme Court, at page 588, stated:

> An offsetting award, however, would upset the statutory balance and impair [the retiree's] economic security just as surely as would a regular deduction from his benefit check.

The foregoing renders irrelevant the testimony of William F. Marples, Respondent's actuarial expert witness. (RT 23-45).

III

THE UNITED STATES SUPREME COURT'S NOTATION OF POSTPONEMENT OF PROBABLE JURISDICTION AT 449 U.S. 917 IS IRRELEVANT TO THE ISSUES HERE ON APPEAL.

The Fourth District Court below placed primary significance in its assertion that "the Supreme Court's decision to grant certiorari in McCarty preceded the filing of [Appellant's] opening brief by five months. (See 449 U.S. 917)." Sheldon, supra, 4 Civ. No. 22645 at 14, 81 Daily Journal D.A.R., 2973. In fact, the Supreme Court never granted certiorari in McCarty; McCarty went up by appeal - no petition for certiorari had ever been filed. On November 4, 1981, the Fourth District admitted this error without comment in its one page "Second Modification of Opinion." What the Supreme Court had

done was to postpone probable jurisdiction in McCarty pending a hearing on its merits. See 449 U.S. 917. Such postponement is an act the Supreme Court can only perform pursuant to its appellate jurisdiction, not via jurisdiction through certiorari. Title 28 United States Supreme Court Rules (Revised) Part IV. Jurisdiction on Appeal, Rule 16(7). Therefore, McCarty's jurisdiction in the Supreme Court was finally engaged through 28 U.S.C. §1257(2):

> By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

However, because jurisdiction was postponed in McCarty, the notice of hearing of the merits had no precedential value whatsoever. In fact, it was not until the opinion was actually rendered

that jurisdiction had been determined. McCarty, supra, 101 S.Ct., 2734 at fn. 12: "Accordingly, we conclude [present tense] on the authority of Dahnke-Walker that this is a proper appeal (emphasis supplied)." The Fourth District Court, without any cited legal authority, nonetheless concluded that although McCarty should not be retroactively "applied" to cases that had become final prior to the filing of the Supreme Court's opinion, it would be "applied" retroactively against Appellant, whose judgment was not final, effectively to the date of the Supreme Court's notice of hearing of merits. Sheldon, supra, 4 Civ. No. 22645 at 17, 81 Daily Journal D.A.R., at 2973. The Supreme Court has no "notice of rulemaking" procedures for cases and controversies, pending decisions on the merits, that bind litigants to suspend or modify their pursuits of remedies on appeal. (Cf. 5 U.S.C. 553(b) - rule-

making in federal administrative procedure). Moreover, the Fourth District's scholarly hindsight to the "meaning" of the Supreme Court's postponement of jurisdiction in McCarty lacks credence in light of that Appellate Court's statement below that California law was "well-settled" (Sheldon, supra at 6, 81 Daily Journal D.A.R., at 2792) in the area of federal pre-emption, when all that California courts had to rely upon were United States Supreme Court denials of certiorari that lack any precedential value nor imply any inference concerning the Supreme Court's view of the merits. Hughes Tool Co. v. Trans World Air Lines, Inc. (1972) 409 U.S. 363, 366. The Fourth District Court's creative "estoppel" is certainly creative, but clearly without legal foundation.

CONCLUSION

The effect of McCarty's holding

(that state community property laws are pre-empted insofar as applied to military pensions) derives from an analysis of federal Constitutional law and the relation between the States and the federal government. Article 3, Section 1, of the Constitution of the State of California provides as follows:

> The State of California is an inseparable part of the United States of America, and the United States Constitution is the supreme law of the land.

The necessary corollary to this principle is that our own State courts "are, of course, constrained by the supremacy clause (U.S. Const. Art. VI, cl. 2) to follow decisions of the Supreme Court on matters of constitutional interpretation . . ." Calderon v. City of Los Angeles (1971) 4 Cal. 3d 251 at 258. Moreoever,

> (w)hen interpreting the federal Constitution, we (state courts) are bound by the high court's holding, notwithstanding state statutory presumptions to the

contrary. Id. at 264.

And in People v. Roth Packing Co. (1978) 85 Cal. App. 3d 308, the Court of Appeal, appraising California statutory meat labling requirements, noted as follows:

> . . . it is clear that the holding of the United States Supreme Court in Jones v. Roth Packing Co., supra, 430 U.S. 519, 530-532 (51 L.Ed.2d 604, 616-618), that the states may not enact labeling requirements which are "in addition to, or different than" those prescribed by the Wholesome Meat Act, is now stare decisis and binding on the courts of this state (emphasis added) (See Calderon v. City of Los Angeles (1971) 4 Cal. 3d 251, 264.) Id. at 324.

There is, then, no question that this court is bound by the decision in McCarty.

Furthermore, in United States v. Tyler (1881) 105 U.S. 244, cited with approval in McCarty at 101 S.Ct., 2736, the Court stated that military retired

pay is "compensation . . . continued at a reduced rate, and the connection is continued, with a retirement from active service only." United States v. Tyler, supra, at 245. The Tyler Court reasoned:

> It is impossible to hold that men who are by statute declared to be a part of the army, who may wear its uniform, whose names shall be borne upon its register, who may be assigned by their superior officers to specified duties by detail as other officers are, who are subject to the rules and articles of war, and may be tried, not by a jury, as other citizens are, but by a military court-martial, for any breach of those rules, and who may finally be dismissed on such trial from the service in disgrace, are still not in the military service. Id. at 246.

The earnings of a spouse while living "separate and apart" are separate property. Cal. Civil Code Sections 5118, 5119. Because presently earned, such military retired pay cannot be subject to community division after separation, much less after divorce. The court simply has no jurisdiction to divide or enforce a

purported division of current "separate-property" earnings.

The Fourth District Court below, in advancing the fiction of "non-retroactivity" of pre-emption in McCarty, attempted to subvert the effect of such pre-emption by labeling McCarty "inimical to principles of equity and fairness." Sheldon, supra, at 11, 81 Daily Journal D.A.R., 2793. The Supreme Court, in Ridgway, supra, has already responded to such a charge:

> We recognize that this unpalatable case suggests certain "equities" in favor of the respondent minor children and their mother. Sergeant Ridgway did have specific obligations to the children that were imposed by the 1977 divorce judgment of the Maine court. Those obligations concerned not only life insurance "now outstanding" for the benefit of the children, but also extended to their support, to clothing, to "medical, dental, and optical expense," and to certain loans and other indebtedness. App. 13-15. Ridgway, instead chose to name his then new wife as beneficiary of his SGLIA policy.[12]
>
> A result of this kind, of

> course, may be avoided if Congress chooses to avoid it. It is within Congress' power. Thus far, however, Congress has insulated the proceeds of SGLIA insurance from attack or seizure by any claimant other than the beneficiary designated by the insured or the one first in line under the statutory order of precedence. That is Congress' choice. It remains effective until legislation providing otherwise is enacted (emphasis supplied). Ridgway, supra at B256-257.

As the United States Supreme Court observed in McCarty approximately 140 days ago:

> . . . Congress may well decide, as it has in the Civil Service and Foreign Service contexts, that more protection should be afforded a former spouse of a retired service member. This decision, however, is for Congress alone . . . Congress has weighed the matter, and "it is not the province of state courts to strike a balance different from the one Congress has struck." ____U.S. ____, 101 S.Ct. at 2743.

WHEREFORE, Appellant Robert Sheldon respectfully requests that for the reasons advanced, and on the authorities cited,

a hearing be granted and that this Court reverse the lower Court's ruling that the Appellant's United States Military Retirement Benefits were community property and remand the matter for further proceedings consistent therewith.

Respectfully submitted,

William E. Blatchley
Attorney for Appellant

APPENDIX C

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

In re the Marriage of LAURA LEE SHELDON, Petitioner and Respondent, and ROBERT MONROE SHELDON, Respondent and Appellant.	CIVIL No. _____

ANSWER TO PETITION FOR HEARING

On Appeal from the Judgment of the Superior Court of the State of California, San Diego County

Honorable CARLOS A. CAZARES, Judge

NANCY H. FLICK
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IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

In re the Marriage of LAURA LEE SHELDON, Petitioner and Respondent, vs. ROBERT MONROE SHELDON, Respondent and Appellant.	Civil No. _____

ANSWER TO PETITION FOR HEARING

TO THE HONORABLE ROSE E. BIRD, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

The petition for hearing should not be granted because the matter was correctly decided by the Court below. Petitioner's attempt to obtain a hearing on the basis of an issue not timely presented to the Court below should be rejected.

STATEMENT OF THE CASE

This is an opposition to a Petition for Hearing from the decision of the Court of Appeal (Fourth Appellate District, Division One, dated November 4, 1981) that affirmed the decision of the Superior Court of the County of San Diego awarding LAURA LEE SHELDON (hereinafter referred to as Respondent) a community property interest in the military pension benefits of ROBERT MONROE SHELDON (hereinafter referred to as Petitioner), in accordance with Petitioner's stipulation at trial. (RT 23)

On February 9, 1979, Respondent filed a Petition for Dissolution of Marriage to Petitioner. (CT 1-2) On February 26, 1979, Petitioner filed his response to the Petition for Dissolution. (CT 7-12)

/ / /

During the trial without a jury on June 22, 1979, Petitioner stipulated in open court that Respondent has a community interest in his military retirement benefits. (RT 23)

The trial court, the Honorable Carlos A. Cazares presiding, issued a letter decision on July 25, 1979, submitting his findings and entering judgment (CT 17), including that:

> "1. The stipulations of the parties made in open court distribute the community property of the parties, fairly and equitably, other than the matters submitted to the Court for decision... (CT 17);
>
> * * * * *
>
> 4. Respondent's [Petitioner at trial] community interest in the military pension is approximately $58,498.00 (CT 18);
>
> 5. Petitioner's [Respondent at trial] community interest in the family residence is approximately $32,875.00 (CT 18);

/ / /

* * * * *

8. Respondent [Petitioner at trial] was awarded the family residence as her sole and separate property (CT 18);

9. Petitioner [Respondent at trial] was awarded the military pension as his sole and separate property." (CT 18)

The parties later stipulated to a Stipulation and Waiver Order filed February 6, 1980, wherein they agreed to a division of certain items of community property. (CT 20-21)

The trial court issued an interlocutory judgment on February 13, 1980 (CT 24), which stated that Respondent had waived her interest in Petitioner's military pension in excess of Petitioner's interest in the family residence. (CT 25) The interlocutory judgment then awarded the family residence entirely to Respondent and the military pension entirely to Petitioner. (CT 25)

The Notice of Entry of Judgment was filed on February 14, 1980 (CT 27)

On April 7, 1980, Petitioner filed his Notice of Appeal from the judgment.

On October 20, 1980, the United States Supreme Court published a notation of probable jurisdiction and notice of hearing in the case of McCarty v. McCarty, No. 80-5, 449 U.S. 917.

On March 2, 1981, McCarty v. McCarty was argued before the United States Supreme Court.

On March 19, 1981, Petitioner filed his Appellant's Opening Brief. In his brief, Petitioner correctly stated that Respondent's community interest in Petitioner's retirement pay had been stipulated to at trial. (Appellant's Opening Brief, Exhibit E, p.6; RT 23, lines 2-8)

On April 8, 1981, Respondent filed a reply brief to Appellant's Opening

Brief. On May 11, 1981, Petitioner filed Appellant's Reply Brief.

On June 8, 1981, the Appellate Court, in an unpublished opinion, affirmed the trial court's decision. Approximately two weeks later, on June 26, 1981, the United States Supreme Court decided McCarty v. McCarty (1981) _____ U.S. _____, 101 S.Ct. 2728, _____ L.Ed.2d _____.

Petitioner filed a Petition for Rehearing in the Court of Appeal on July 6, 1981. The court granted it and sent the parties a letter dated July 7, 1981, requesting that they submit letter briefs addressing the effect of McCarty upon the factual context of this case. Petitioner submitted his letter brief on July 23, 1981, and Respondent submitted hers on July 27, 1981. (A copy is attached as Exhibit D.)

On October 7, 1981, the Appellate Court issued an opinion certified for publication affirming the trial court's decision. Sheldon v. Sheldon (1981) 4 Civ. No. 22645 (Super Ct. No. D 136107) (hereinafter referred to as Appellate Court Opinion, Exhibit A).

Two Modifications of the Opinion subsequently were issued. The first, on October 9, 1981, dealt with technical errors. The second, on November 4, 1981, included the correction of footnote three on page four of the Appellate Opinion, changing the statement that McCarty went to the Supreme Court on a grant of certiorari to read that McCarty went up on appeal and was granted probable jurisdiction, postponing further consideration of jurisdiction pending a hearing of the case on the merits. (A copy of the Second Modification of

Opinion is attached as Exhibit B.)

On November 16, 1981, Petitioner filed the Petition for hearing before this Court. Respondent filed this Answer in opposition to the Petition for Hearing on November 27, 1981.

ARGUMENT

I

A HEARING SHOULD BE DENIED BECAUSE PETITIONER STIPULATED AT TRIAL THAT THE PENSION WAS COMMUNITY PROPERTY AND SUBSEQUENTLY FAILED TO RAISE THE PREEMPTION ISSUE AT A TIME WHEN HE KNEW OF McCARTY'S PENDENCY.

The record clearly shows that Petitioner's attorney William Blatchley stipulated in open court that Respondent has an interest in Petitioner's military retirement benefits. (RT 23, lines 2-8) Petitioner's statement that he never so stipulated (Petition for Hearing,

Exhibit C, p.2) is blatantly erroneous.

The Reporter's Transcript, at 23: 2-9, reads:

> [MR. BLATCHLEY:] The Respondent [Petitioner herein] is prepared to stipulate that the Petitioner [Respondent herein] does have a community interest in Respondent's military retirement.
>
> [THE COURT:] Very well.

Petitioner affirmed this stipulation in his Appellant's Opening Brief when he stated, at page six:

> Appellant herein does not contest the fact that petitioner is entitled to a portion of his retirement pay. Said fact was stipulated at trial. (RT p.23, lines 2-8)

In his Petition for Hearing, Petitioner now attempts to deny the fact of his stipulation by resort to superficial semantical arguments. Petitioner's argument that the only effect of his attorney's statement that he was "prepared" to stipulate was the creation of an

"unaccepted offer" (Petition for Hearing, Exhibit C, p.14), is not only wholly frivolous; it insults the intelligence of this Court. Reference to the Reporter's Transcript disclosed that Petitioner's attorney intended to make a stipulation at the time he made the statement in question. (RT 22-23)

Petitioner's failure to timely raise the preemption issue in his Appellant's Opening Brief constituted a waiver of that issue. The Appellate Court was correct in so holding.

> Appellate courts will notice only those assignments pointed out in the brief of an appellant, all others are deemed to have been waived or abandoned. [Citations.]
>
> Title Guarantee and Trust Co. v. Fraternal Finance Co. (1934) 220 Cal. 362, 363, 30 P.2d 515.

The Appellate Court correctly rejected Petitioner's argument below that the rule of waiver of issues not timely

raised should not apply where a definitive court ruling declaring a new rule of law is announced after appellant has filed his opening brief. It is within the discretion of the appellate court to bind a litigant who fails to timely raise an issue. Rayner v. Ramirez (1958) 159 Cal.App.2d 372, 324 P.2d 83. In Smith v. Lewis (1975) 13 Cal.3d 349, 118 Cal.Rptr. 621, an attorney's malpractice action resulted from the court's exercise of discretion in denying a motion to amend a decree on the ground of untimeliness. On the other hand, in Rayner v. Ramirez, supra, the court exercised its discretion to arrive at the opposite result. "Under the circumstances there appears to be good reason for the failure of plaintiffs to raise the point in their opening brief." Id., at 375. (Quoted and discussed in the Appellate Court Opinion, Exhibit A, at p.14)

But under the circumstances of this case no good reason exists for Petitioner's failure to raise the preemption issue in his opening brief. The Appellate Court observed:

> Since the original stipulation was entered into before the grant of certiorari [(sic); See Second Modification of Opinion, Exhibit B], it may be that such action was excusable. After the grant of certiorari, however, Robert should have argued on appeal or in a separate motion to the trial court that continued enforcement of the stipulation would be unjust in light of the United States Supreme Court's action. Having failed to pursue either of these alternatives, it is not unfair that Robert continue to be bound by his original agreement.
>
> Appellat Court Opinion, Exhibit A, at 15.

Based on the assumption that Petitioner must have had knowledge of significant current developments in the law, the Appellate Court analyzed the

possible reasons for his deliberate failure to raise the preemption issue:

> Litigants often stipulate to conclusions or fail to pursue technically meretorious legal arguments due to personal values and attitudes toward equity or responsibility. This is particularly true in dissolution proceedings where the parties may have many reasons to attempt to limit the animosity engendered by the litigation process. We thus may only evaluate the validity of a stipulation or decision not to contest based on what the party should have known regarding the state of the law.
>
> (Appellate Court Opinion, Exhibit A, at 16, ftn. 10)

Under the circumstances here, where Petitionerhad ample notice of a pending imminent change in the law, the Appellate Court correctly concluded that Petitioner's failure to timely raise the preemption issue constituted a waiver of that issue and was grounds for denial of his appeal.

II

THE APPELLATE COURT CORRECTLY DETERMINED THAT McCARTY SHOULD NOT BE GIVEN RETROACTIVE EFFECT HERE, IN LIGHT OF THE PECULIAR FACTS OF THIS CASE.

The Appellate Court repeatedly emphasized that its holding was narrowly limited to the peculiar facts before it. It stated:

> [W]e conclude that the holding in McCarty is inapplicable to cases where a service member-spouse stipulates to the community nature of his or her pension rights at trial, and does not timely contest such characterization on appeal.
>
> (Appellate Court Opinion, Exhibit A, at 17.)

We only answer the narrow issue before us, concluding

> (1) the principles enunciated by the Supreme Court which govern the retroactivity of high court decisions mandate McCarty not be accorded full retroactivity, and

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> (2) McCarty should not be applied to cases not final on appeal unless the military spouse requested the trial court reserve jurisdiction on the character of the property interest in the pension or timely raised and briefed the federal preemption issue on appeal.
>
> Appellate Court Opinion, Exhibit A, at 2.

The Appellate Court's thoroughly documented discussion of the balance of interests in determining prospective versus retroactive application of McCarty belies Petitioner's assertions that the court's decision lacks legal foundation and that it attempts to subvert the doctrine of federal preemption. Petitioner is also grossly incorrect in stating that the cases on which the Appellate Court relied in applying the test of non-retroactivity are not federal preemption cases. (Petition for hearing, Exhibit C, pp.6-7) In fact, the cases on which the

court relied both squarely dealt with the preemption issue.

In Rodrigue v. Aetna Casualty and Surety Co. (1969) 395 U.S. 352, 89 S.Ct. 1935, 23 L.Ed.2d 360 (cited in the Appellate Court Opinion, Exhibit A, at p.5 fn. 4), the United States Supreme Court construed the Outer Continental Shelf Lands Act ("Lands Act") as not ousting a state's applicable statute of limitation in favor of imposing the admiralty doctrine of laches. Id., at 355. It further held that the Lands Act ensured that no deferal preemption of state laws was effected by the Death on the High Seas Act ("Seas Act"). Id. Thus, although two federal statutes were discussed, the issue was federal preemption, not merely a choice between two federal statutes as Petitioner contends. (Petition for Hearing, Exhibit C, p.7)

In Chevron Oil Co. v. Huson (1971) 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296, the United States Supreme Court decided against retroactive application of the Rodrigue rule that the state statute of limitations must apply in such cases. The Court denied retroactivity even though Rodrigue was decided when Huson was no further along in litigation than the discovery stage. Id., at 99. In so holding the Court enunciated a three prong test for determining when the doctrine of nonretroactivity should be invoked. The Appellate Court set out this test in its opinion:

> (1) whether "the decision to be applied nonretroactively ...establish[es] a new principle of law, either by overruling clear past precedent on which litigants may have relied, [citation] or by deciding an issue of first impression whose resolution was not clearly foreshadowed [citation]";
>
> * * * * *

> (3) whether retroactive application of the rule "'could produce substantial results..., injustice or hardship....' [Citation.]"
>
> Appellate Court Opinion, Exhibit A, p.5; quoting in part Chevron Oil Co. v. Huson, supra, at 106-107.)

Applying this standard, the Appellate Court correctly concluded that the rationale underlying McCarty did not mandate its retroactive application because no strong federal interests would be served by retroactivity on the one hand and, on the other hand, retroactivity would impose an unfair hardship on Respondent as well as create an intolerable burden on the California courts. (Appellate Opinion, Exhibit A, pp.7-11)

Specifically, the court noted that prospective application of McCarty would not harm the federal interest in creating an inducement for potential enlistees and reenlistees in the armed services,

because propsepctive application clearly still operates prosepctively as to persons who have not yet enlisted or reenlisted. (Appellate Court Opinion, Exhibit A, pp.8-9) As to service members who have already retired, the pension incentive was inapplicable to them in the first place, and thus no disincentive to the federal interest in reenlistment is effected as to them. (Id., at p.9)

Additionally, the court emphasized that the potential for injustice and hardship resulting from retroactive application of new law in the field of domestic relations is particularly great.

> There is no guarantee that the non-service member spouse would have assets sufficient to reimburse the service member for that portion of the pension rights which had previously been an awarded share of community property. Substantial hardship would result in cases where the non-member relied on the property

> settlement in converting his or her share into non-liquid assets.
>
> (Appellate Court Opinion, Exhibit A, p.10.)

The above-described hardship would certainly result in this case since Respondent's meager income is insufficient to reimburse Petitioner if he were awarded a portion of the pension rights that had previously been an awarded share of community property. It is extremely probable that, in this event, Respondent would be forced to sell the family residence and to adopt a standard of living substantially lower than that to which she and her children are accustomed.

Additionally, the retroactive application of McCarty would be highly likely to "trigger a second round of relitigation involving spousal awards," in the Appellate Court's view (Appellate Court

Opinion, Exhibit A, p.10-11), and such relitigation would create an "immense burden on the administration of justice in our civil courts," if permitted. (Id., at p.11.)

Support for the Fourth District's decision in this case is also provided by a nearly identical case decided by the Second District on August 26, 1981. In In re Marriage of Mahone (1981) _____ Cal.App.3d _____, 176 Cal.Rptr. 274, the husband had stipulated at trial that a portion of his military retirement benefits were community property, and the trial court had so found pursuant to the stipulation. Id., at 276. In denying the husband's appeal of this decision in light of McCarty, the Second District stated:

> The written stipulation was filed with the trial court January 5, 1978. As of that

> date it was settled California law that a federal military pension was subject to division as community property, and the United States Supreme Court had not indicated to the contrary. [Citations.] The stipulation was in accordance with the law as it then stood, and Husband is not entitled to relief from the stipulation merely because the law was subsequently changed by judicial decision.
>
> Id.

The above reasoning becomes even more forceful where, as here, the husband had ample time to contest his stipulation and failed timely to do so.

For the foregoing reasons, the Appellate Court was correct in concluding that McCarty should be denied retroactive application in the case because the service member-spouse stipulated to the community nature of his pension rights at trial and did not timely challenge such characterization on appeal.

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III

THE NOTATION OF PROBABLE JURISDICTION AND NOTICE OF HEARING OF McCARTY BY THE UNITED STATES SUPREME COURT, PUBLISHED AT 449 U.S. 917, IS RELEVANT TO THE QUESTION OF WAIVER OF ISSUES RESULTING FROM PETITIONER'S FAILURE TO TIMELY RAISE THEM IN HIS OPENING BRIEF.

As described supra in the Statement of the Case herein, the notice of hearing of McCarty was published by the Supreme Court on October 20, 1981, five months before March 19, 1981 when Petitioner submitted his Appellant's Opening Brief. Additionally, McCarty was argued before the Supreme Court on March 2, 1981, over two weeks before Petitioner submitted his Appellant's Opening Brief. Petitioner's failure to raise the preemption issue in his Brief, in the face of this significant imminent change in the law, was held

by the Appellate Court to constitute a waiver of the peemption issue. (Appellate Court Opinion, Exhibit A, pp.13-17.)

Petitioner argues, however, that the October 20, 1980 notation of probable jurisdiction and notice of hearing at 449 U.S. 917 lacked precedential value. This argument has no effect on the validity of the court's conclusion because presence or absence of precedential value does not change the fact that the publication in and of itself gave Petitioner notice of McCarty's existence. As stated infra, the Appellate Court presumed Petitioner was aware of current developments in the law at the time he failed to raise the preemption issue in his Appellant's Opening Brief. (Appellate Court Opinion, Exhibit A, p.16, fn. 10)

Petitioner also contends that the fact that McCarty went up on appeal

instead of by grant of certiorari to the United States Supreme Court has some significance. (Id., at p.16) This contention is groundless. Even if the Supreme Court is only able to postpone probable jurisdiction when a case comes up on appeal and not when it is granted certiorari, as Petitioner asserts (id.), this fact would not preclude the Court's notation of probable jurisdiction in an official publication from putting Petitioner on notice as to an imminent change in the law.

Similarly, Petitioner's comment that the United States Supreme Court has no "notice of rulemaking" procedures requiring publication similar to those governing administrative agencies (Petition for Hearing, Exhibit C, p.17) has absolutely no bearing on the fact that the Supreme Court's notation of probable

jurisdiction and notice of hearing pending, published at 449 U.S. 917, gave notice to Petitioner of an imminent change in the law. Whether or not the Supreme Court was bound to make such a publication was irrelevant once the publication was actually made.

CONCLUSION

It is respectfully submitted that the Petition for Hearing in this matter should be denied for the following reasons:

Petitioner waived his right of appeal on the federal preemption issue when he failed to contest his stipulation at trial that the pension was community property or otherwise to timely raise the preemption issue. He may be presumed to have known that McCarty's pendency before the United States Supreme Court signaled a potential change in the law on

federal preemption affecting this case. In light of Petitioner's failure to timely raise the preemption issue and the likelihood of a substantial injustice to Respondent if McCarty is retroactively applied to this case, the Appellate Court's decision should be upheld.

The Appellate Court correctly invoked the Huson test of nonretroactivity, given that Huson was a case involving federal preemption. The Court correctly applied this test and found that no strong federal interest would be adversely affected by denying retroactivity but a substantial injustice to Respondent would have been likely if retroactivity were granted.

The Supreme Court's notation of probable jurisdiction over McCarty at 449 U.S. 917 is relevant to the issue of Petitioner's knowledge of the

existence of a federal preemption issue in this case. Consequently, it is also relevant to the issue of Petitioner's waiver of the preemption issue resulting from his failure timely to plead it. Petitioner's assertions concerning the lack of precendential value of the notation at 449 U.S. 917 and the lack of "notice of rulemaking" procedures completely fail to refute the altogether reasonable assumption that he had knowledge of McCarty's existence, and therefore may be held to have waived the issues raised by that case by failing to timely raise them.

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For the foregoing reasons, the Appellate Court was correct in holding that McCarty should be denied retroactive application in this case and in denying Petitioner's appeal.

DATED: November , 1981

Respectfully submitted,

Nancy H. Flick
Attorney for Respondent

APPENDIX D

(The order of the California Supreme Court denying Appellant's petition for a hearing appears in the Court's minutes for December 2, 1981. Those minutes are reprinted in the advance sheets of "California Official Reports," 1981, Number 35, Minutes, at p. 3 (December 29, 1981). The minutes will not appear in the bound version, known as "California Reports" 3d.)

MINUTES

SUPREME COURT [OF CALIFORNIA]

Los Angeles, December 2, 1981

. . .

(4 Civ. 22645 Div. 1) -- In re the Marriage of Sheldon, Sheldon v. Sheldon. [124 Cal.App.3d 37] Appellant's petition for hearing denied.

CERTIFICATE OF SERVICE BY MAIL

I declare that I ~~have applied for admission~~ am admitted to practice before this Court and that I represent the appellee herein.

My business address is 3456 Camino Del Rio North, Suite 200, San Diego, California 92108.

On March 26, 1982, I served the within MOTION TO DISMISS on the interested parties in said cause by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Diego, California addressed as follows:

WILLIAM E. BLATCHLEY
110 Laurel Street
San Diego, CA 92101
Telephone: (714) 232-3111

WILLIAM R. NEWSOME
225 Broadway, Suite 1600
San Diego, CA 92101

FRANK T. VECCHIONE
108 Ivy Street
San Diego, CA 92101

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on March 26, 1982 at San Diego, California.

Nancy H. Flick